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Supreme Court of the United States

OCTOBER TERM, 1949

No. 44

HEMAN MARION SWEATT, PETITIONER,

vs.

THEOPHILIS SHICKEL PAINTER, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED MARCH 23, 1949.

CERTIORARI GRANTED NOVEMBER 7, 1949.

SUPREME COURT OF THE UNITED STATES

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IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS, 126TH JUDICIAL DISTRICT

No. 74,945

HEMAN MARION SWEATT, Relator

vs.

THEOPHILIS SHICKEL PAINTER, et al., Respondents

Statement of Facts

Before Hon. Roy C. Archer, Judge.

APPEARANCES:

Mr. W. J. Durham, Mr. Thurgood Marshall, Mr. E. B. Bunkley, Jr., Mr. James M. Nabrit, Jr., Counsel for Relator.

Mr. Price Daniel, Attorney General of Texas; Mr. Jackson Littleton, Asst. Atty. Gen. of Texas; Mr. Joe Greenhill, Asst. Atty. Gen. of Texas, Counsel for Respondents.

Be It Remembered that on Monday, May 12, 1947, and succeeding days, all in the Regular March Term of said Court, there came on to be heard the above entitled and numbered cause; whereupon the Court admitted into evidence the following:

[fols. 2-7] AFTER SESSION

May 12, 1947

2:00 P. M.

STATEMENT BY THE COURT

The Court: It seems this morning that perhaps I wasn't as clear in making a statement of this trial as perhaps I should have been. This case was tried here on stipulations and on some testimony other than stipulations and went to our Court of Civil Appeals, and by agreement of all parties, the Court of Civil Appeals entered an order in which this cause was remanded generally to this Court for

further proceedings, without prejudice to the rights of any party to this cause. I think we needed that additional explanation. If we are ready now, we may go ahead.

Mr. Durham: Relator is ready, Your Honor.

The Court: Are you ready, Mr. Attorney General?

Mr. Daniel: Yes.

Thereupon counsel for relator and counsel for respondents presented to the Court a statement of their respective pleadings in this cause.

The Court: I think with the trial being had before the Court we will be able to hear your testimony and at the same time bear in mind your exceptions on either side. So, for the time being, I am just going to carry your exceptions along in the trial of this case. If at a later time it requires a little more time on your part to prepare to meet issues that may be raised, which might be somewhat of a surprise to [fol 8] you, the Court will give you that time.

Mr. Durham: To save time, I thought we could go on with our testimony, we could go on this evening, and maybe talk about the stipulations after Court adjourns.

Mr. Daniel: Just so it is understood, we have no stipulations at this time.

Mr. Durham: That is right, we have no stipulations at this time.

The Court: I haven't heard it if you have.

Mr. Durham: It is agreed that respondents will put their testimony on first, and then we will put our testimony on, but in the record as it is made up, the relator's testimony will come first in the record.

The Court: All right.

Reporter's Note:—By agreement of counsel later, this statement of facts was ordered prepared setting out the testimony and proceedings in chronological order.

Mr. Daniel: Your Honor, we have a witness that we want to put on out of order, and I believe it is agreed we may do that.

The Court: All right.

D. A. SIMMONS, a witness produced by Respondents, having been by the Court first duly sworn as a witness testified as follows:

[fol. 9] Direct examination.

Questions by Mr. Daniel:

Q. State your name.

A. D. A. Simmons.

Q. Where do you reside, Mr. Simmons?

A. Houston, Texas.

Q. What profession are you in?

A. Attorney at law.

Q. Do you hold a law degree?

A. I do.

Q. From what school?

A. The University of Texas Law School.

Q. Do you hold any other law degrees?

A. I have an Honorary Doctor of Law degree from the University of Montreal and an Honorary Doctor of Law degree from Loyola University in New Orleans.

Q. How long have you practiced law?

A. Twenty-seven years.

Q. Have you during that time had any official association with The American Bar Association?

A. I have.

Q. Would you please state your official connection with the American Bar Association?

A. Well, if I may, I would like to go just a little back of that, because I understand I am called—I know nothing about the case, but I am called on as a witness on certain [fol. 10] phases of the American Bar standards.

The Court: Yes.

A. I have been President of the Houston-Galveston Bar Association, 1932 and 1933. I was President of the Texas Bar Association in 1937 and 1938. I was President of the American Judicature Society in 1940 and 1942. For the record, I would like to state the American Judicature Society is the second largest national organization of lawyers in the country, and I was President of the American Bar Association in 1944 and 1945, having heretofore been on the Board of Governors for five years.

Q. Have you in your American Bar Association work had occasion to be on any boards that inspected law schools or passed upon the requirements of whether or not certain law schools met requirements of the American Bar Association?

A. The standards of the American Bar Association are set by the House of Delegates. They are recommended by the Board of Governors and the Section of Legal Education. I have been a member of the Board of Governors in 1937 to 1940, and 1944 to 1946. I have been a member of the House of Delegates representing the lawyers of Texas, 1936 until today. I am still a member.

Q. In your experience with the American Bar Association, I will ask you if you have ever had occasion to study the standards of the American Bar Association as far as law [fol. 11] schools are concerned?

A. Yes, sir, I am familiar with them. I was a member of the House when they were voted.

Q. You are acquainted with the standards as they exist today?

A. Yes, sir.

Q. Are you acquainted with the physical facilities, the faculty, library, courses of instruction, and other matters related to the University of Texas School of Law?

A. Well, I would say that since I was graduated there in 1920, my late visits, I have not counted the law books. I know they have a very substantial law library. I do not know how many books, and I know a good many of the professors, and I am familiar in a general way with the course of instruction.

Q. Do you know whether or not the University of Texas Law School meets the standards of the American Bar Association for an accredited law school?

A. It is an approved school.

Mr. Durham: We object to that because it is an assumption of what those standards are. The witness hasn't testified what the standards are. It is assuming what the standards are.

The Court: I believe I will let him proceed, Counselor, along this line. You will save your point, and maybe we will get back to it.

A. My answer is: It is an approved law school. It has [fol. 12] been inspected and approved by the House of Delegates of the American Bar Association as having complied with the standards.

By Mr. Daniel:

Q. Are you acquainted——

A. I can say what the standards are, briefly.

Q. Will you briefly state what the standards are?

Mr. Marshall: I think the standards are the best evidence.

A. I think so.

The Court: The standards are.

A. I assume that counsel on both sides have them.

Mr. Marshall: Unfortunately, if Your Honor please, we do not have them, except that one person on our staff has them, and he is not in the court room at this time.

The Court: All right.

By Mr. Daniel:

Q. I will ask you if this page contains the standards of the American Bar Association with reference to approved schools?

A. That is the copy of the standards as approved by the House of Delegates of the American Bar Association.

Mr. Daniel: We wish to offer it. We offer from page 1. It is headed, "Standards of the American Bar Association."

Q. I believe your testimony was that the University of Texas Law School has been approved as having met those standards?

[fol. 13] Said instrument was admitted in evidence as Respondents' Exhibit No. 1.

A. That is correct.

Q. Now, I will ask you, Mr. Simmons, at my request, whether or not you have inspected the law school for the State University for Negroes here, adjoining the Capitol grounds in Austin?

A. Dean McCormick, of the Texas University Law School, took me when the Court recessed this morning, to the build-

ing just north of the Capitol, where on the ground floor I found three rooms and a hall and toilet facilities. The first room had three or four or five study desks, a law book case or two with approximately, I would say, one hundred and fifty to two hundred books, and there were two class rooms the Dean pointed out, one with students' study desks; the other one he said was a reserve room in case more than eight or ten students applied. I saw that. I know where that is. I walked over to the Capitol. I was informed, from the reading of the pleadings this morning, which is all I know about that phase of it. I learned that the Supreme Court Library was made available by the statutes. I have a little familiarity with that from twenty years ago as First Assistant Attorney General. I went back, and the books seemed to have been kept up to date, and it is about a hundred or a hundred and fifty yards from this school.

Q. You are speaking now of the State Library and the [fol. 14] Supreme Court Library?

A. Yes, sir; on the second floor on the north side in the Capitol Building.

Q. And that was about how far from the school?

A. The north entrance of the Capitol, I would say, was a hundred yards. This is on the second floor immediately above the north entrance.

Q. How many volumes of law books are required by the American Bar Association for a library that meets its standards?

A. Well, the standards themselves call for an adequate library. The interpretation of that, to get it down to actuality, has been seventy-five hundred well-selected books with cases, in complete sets.

Q. I would like to ask you if the Supreme Court Library, with which you say you are familiar, and the State Library there in the Capitol Building, has been kept up to date, and if the evidence shows there are over 40,000 books in that library, would it meet the requirements of the American Bar Association for a law school library?

A. Well, I glanced over some of the sets. They are up to date. Whether there are 40,000, I would rather leave to the librarian, but obviously there are a great deal more than 7,500 books, and they are books of a character that would afford an adequate legal education.

Q. Now then, did you in talking with Dean McCormick [fol. 15] acquaint yourself as to the courses of instruction that are being offered to the law school of the Texas State University for Negroes?

A. Well, I was merely informed from the set-up, and from the books on the shelves that the freshmen, first year law school courses are the courses that would be available at this time, and that they were the identical books and the identical courses given the first year law students at the University of Texas Law School.

Q. I will ask you a hypothetical quest on. If the evidence in this case shows that in the building at you have already inspected, the University of Texas law faculty, the same faculty members, offered the same courses in law in that building, and with the library facilities of the Supreme Court Library that we have mentioned, and if the requirements for entrance are the same, the requirements for graduation are the same, as the Texas University Law School, if the evidence shows that the requirements for classroom study and all requirements contained in the catalogue of the University of Texas Law School must be met in the law school of the State University for Negroes, if the evidence shows what I have recited, in your opinion, will Texas University for Negroes Law School offer equal educational opportunities in law as that offered by the University of Texas?

Mr. Marshall: If Your Honor please, assuming he is an [fol. 16] expert, and assuming all that is in the hypothetical question, I don't thing this witness is entitled to give a conclusion as to what the law is in the case. I think that is your job.

The Court: I think he hasn't asked him a law question. I think he is asking him if, as an expert, it is substantially the same.

Mr. Marshall: The question was whether it furnishes the equality required.

The Court: Well, he wouldn't say whether there is an equality of not.

Mr. Marshall: May we have an exception, please, sir?

The Court: Yes, sir.

By Mr. Daniel:

Q. You may answer, please.

A. In my opinion, the facilities, the course of study, with the same professors, would afford an opportunity for a legal education equal or substantially equal to that given to the students at the University of Texas Law School.

Q. That is all.

Cross-examination.

Questions by Mr. Marshall:

Q. Mr. Simmons, what is the purpose of accreditation from the American Bar Association, of law schools?

A. To make standards—pardon me. Would you mind telling me your name?

[fol. 17] Q. Thurgood Marshall.

A. And you are from where?

Q. Originally from Baltimore, and now from New York.

A. I like to know who I am talking to.

Q. Good.

A. The purpose of any standards are to set a goal. The American Bar Association standards are to assure adequate legal education to those who are going to represent the public as lawyers. They are merely recommendations, and as—and your name?

Mr. Durham: Durham.

A. As Mr. Durham suggested a while ago, the American Bar Association is a private association of lawyers, about 40,000, and it set up these standards as a guide to the law schools, because when the standards were set up there were a great many law schools in the United States, mainly night schools, that were giving courses that were deemed to be inadequate, inadequate to prepare the lawyers of the future generation.

Q. And isn't it true that many studies have been made by the American Bar Association and the officials, including several past presidents, concerning the inferior education obtained in small, part-time law schools? Isn't that true?

A. The Association has been concerned with legal education since 1896, and it has made many studies. That part is entirely correct. We are now beginning to engage in a study [fol. 18] that used to be done by the Carnegie Foundation.

They used to make an annual survey of legal education, and Mr. Reed of that Foundation, I think, was assigned other duties about ten years ago, and the American Bar Association has taken over that officially.

Q. Are you using Mr. Reed officially?

A. No, sir; I happen to know him personally.

Q. Have you read any of his studies?

A. I have many of them in my library.

Q. You are familiar with his viewpoint on part-time law schools?

A. I would prefer to answer mine. I have studied at night part time law schools myself. I have studied law in every form, I think. I studied in my father's office as a boy. I came to the University of Texas not having funds to proceed through. I stopped for a couple of years and went to night law school, working in Houston, an unapproved part-time school, with no books except those you could borrow, and I came back after the First World War and came back here, and I believe I am familiar with the office study and small part-time school and the approved law school, and sympathetic with all three.

Q. As a matter of fact, as of the present time, isn't the American Bar Association opposed to part-time law schools?

A. No.

[fol. 19] Q. Hasn't the American Bar——

A. For the night school, what they want is legal education for the future lawyers, and as the small school or the night school obviously can't give as much time to the student as a day school, full-time, they require that they give four years of three hours in the evening instead of three years like the regular approved schools, but many of the part time schools are approved.

Q. Do you mean approved by the American Bar Association?

A. Yes, as having complied with these standards.

Q. There is another accrediting agency, the Association of American Law Schools?

A. Yes.

Q. Isn't this true; their standards are higher than the American Bar Association's?

A. In some instances, I think they are more stringent.

Q. Isn't it a fact that there are some schools approved by the American Bar Association that are not approved by the Association of American Law Schools?

A. I think that is true in some instances. I believe Lincoln University in St. Louis is approved, on our lists——

Q. It is on both of the sections?

A. That is the law school, I think. My last check, I think it had 35 students.

Q. Counting the faculty?

[fol. 20] A. Take Howard—that is a colored law school at St. Louis. Howard School of Law in Washington, the last time I had occasion to go to that, I believe it had—just before the war, I believe they had about 67 students. It is a fully approved school.

Q. Both associations?

A. I think so.

Q. Yes, sir. Is it not true that accreditation by the American Bar Association is an asset to the school and the pupil and the community?

A. We hope so.

Q. And it is your opinion that it is of value to any school?

A. Yes, sir.

Q. And would you not, therefore, say that attendance at an unapproved school does not give equal education to attendance at an approved school?

A. No, I wouldn't say that, because any school,—all of these schools we have named at one time were on the unapproved list. They had to prove how the facilities may be equal, but the student body, after all, is the one that is going to determine the standing of that school, and if the student body takes advantage of the facilities offered, and by the State Bar examination, which has no relationship to the school itself, passed the State Bar examination, and the students of that school, as many in proportion, uphold the [fol. 21] teaching of that school, it is likely, of course, to be approved more readily than one where the product does not stand the gaff of the State examination.

Q. The American Bar Association waits and watches what the school is doing before they approve it?

A. Yes, sir.

Q. They always do that, don't they?

A. Yes, sir.

Q. But you think in the meantime the school still should be giving the same training as an accredited school?

A. Absolutely. The training is for the individual.

Q. I understand——

A. It has got to be from the inside, what the man develops himself, what he can absorb himself. If he has the books and curriculum and physical facilities, the light, the books, the professors, I would venture to say that a student who had,—let's say that school had ten students, with four professors teaching ten students, that the ten students should absorb a great deal more law than with ten insfructors teaching seven or eight hundred students.

Q. They approve the school, the curriculum and the plant?

A. And the product.

Q. You don't just approve it on the product?

A. No, these standards should show there are seven or eight hundred well-chosen volumes and should have pro-[fol. 22] fessors who are full time professors in the field of law.

Q. Did you know that these proposed professors for the Negro school are to be part time professors? Did you know that?

A. I understood they were full time law teachers.

Q. Did you understand their work there was to be part time?

A. I would say that with ten students, it would have to be.

Q. I don't know what you mean by that.

A. I was advised by the Dean of the Texas University Law School the will be the same men that teach at the Texas University Law School. They are full time teachers, of course, employed by the State of Texas to teach students in law.

Q. But we are talking about the so-called Negro school. As to that school, they are part time?

A. Yes, sir, that is true. They would also be part time at the University of Texas.

Q. Did you find out where their offices are?

A. At the other school, but they have a desk here. I was pointed out,—all I know is what I was told this morning, and I told you who told me. I was pointed out the books, the desks, the chairs, and the rooms, and the distance from the State Supreme Court Library, and I went over there to see if it was where it used to be.

Q. Do your standards of the American Bar Association, in accrediting a school,—isn't it limited to what is in the school? To be specific——

A. Until students come, this isn't a school.

[fol. 23] Q. Thank you, sir; but the other question is this. If you have a school, for example; you are familiar with the fact, are you not, that the library in the Library of Congress is one of the best in the country? Are you not familiar with that?

A. Yes, sir.

Q. If you had a university in Washington with no law library, but access to the Library of Congress, would you accredit that school?

A. You are talking to me. I am only one of 185 delegates in the House of Delegates. I do not personally accredit anybody. If the law school you are talking about had trained professors, set up by Congress across the street, a hundred yards from that library, and the Act of Congress said this library shall be the library of that school, I would say, so far as I was concerned, I would say they had been furnished an adequate library, all of the books they could hope to read or study.

Q. I didn't say the library was made a part of the school. I said "made available", like it is to everybody else.

A. Yes.

Q. Because it is available, would you, therefore, use that as a part of the accrediting of the school?

A. Having used this one myself, I know there are not so many people there but what you can always find table space [fol. 24] and all of the books you want to study or read. We are trying to get some law and the standards of the law into the mind and soul of the individual student. I am not trying to build a building for you, or law books. We are trying to build lawyers with character.

Q. But you do require the building with the law books?

A. We require, as I said before, we require that a certain number of certain proper law books be available.

Q. What do you mean by "available"?

A. You are the one that asked me,—you said a while ago, questions on availability. I will say that any time you have a law library a hundred yards away from your school, and that the Legislature says these books are for the use of that school, that those books are available.

Q. I think you are familiar with the statute that says they shall be available. Isn't that the language?

A. I will let the Judge pass on the statute.

Q. You are quoting from it?

A. You were talking about Congress, if the Law Library of Congress was available, and I am trying to define what I mean by available.

Q. Do you know of any other school the Americann Bar Association approved that didn't have a library in the building where the school was?

A. All I can say is I haven't inspected over about eight [fol. 25] law schools personally.

Q. You have been passing on law schools for how many years?

A. Personally?

Q. Yes, on the Committee?

A. On the House of Delegates since it was established in Boston in 1936, and three years before that as a member of the General Council from Texas.

Q. During that period, has that body approved a law school that did not have a library in the building where the law school was?

A. I can't answer that.

Q. To your knowledge?

A. All we have ever passed on were——

Q. Can we first get an answer to that; and then you can go ahead? Do you know, to your knowledge, that——

A. I can answer that like lawyers do, either way. I don't know, because the practice is this. Mr. Demuth, of the University of Colorado, and Mr. Sullivan, from the University of Illinois, inspect the schools, and they come back and report to the House of Delegates of the American Bar Association, "We have inspected Lincoln University Law School. It has an adequate available library." Nobody has ever said there is one in the building across the street, in all of the years that I have acted as one of those that have passed on it. In the eight schools that I have in- [fol. 26] spected, they all had libraries either in the building, or in adjacent buildings.

Q. That is the purpose of having libraries in the law schools?

A. In the school?

Q. Yes.

A. To make books available so that the student can study and learn the principles of law.

Q. Don't your requirements also require that you have a trained, competent librarian?

A. Someone should be familiar with the books. He doesn't need to be a full time librarian.

Q. Do you require that you have a full time dean?

A. The interpretation that has been made by the Committee before they are recommended to the House of Delegates, the school should have at least one full time professor or dean for each one hundred or fraction thereof, of pupils. We don't require a full time dean, as you quite well know, Mr. Marshall.

Q. I don't know anything about what the American Bar Association requires, because I am not a member of it for one reason.

A. May I go ahead?

Q. You may proceed.

The Court: Until somebody stops you, you can proceed.

A. This is quite interesting to me. Are you a member of the Lawyers' Guild?

By Mr. Marshall:

Q. One of the founders of it, and a member of the Board [fol. 27] of Directors.

A. Are you a member of the National Bar Association of Colored Lawyers?

Q. I am a former Secretary for four years of it.

A. That is a national association of colored lawyers?

Q. No, sir; it is an association of American lawyers that has no bars as to race, creed, or color.

A. Is there a single white lawyer in it?

Q. Yes, sir; Martin Popper, and two or three others that I can name.

A. Of course, we have colored lawyers in the American Bar Association.

Q. You had one up until two years ago?

A. Bill Lewis. That is purely aside. We can go on with the questions. I helped organize The Texas State Bar. We have colored lawyers in that. We have colored lawyers in the American Judicature Society, if that has any place in the record.

Q. Getting back to the law library, and the American Bar Association. They do require that we have at least one full time dean or full time professor for each one hundred students?

A. There must be one full time man.

Q. I will ask you a hypothetical question. If there is a law school established here in Texas for Negroes that has [fol. 28] not a single full time professor or dean, would you say that that gives the type of education that would meet the approval of the American Bar Association?

A. Well, I am going to have to assume that this law school has some students and there are——

Q. Assume not less than one hundred.

A. Lincoln, say, with thirty-one. I would say if, as, and when this school has enough students to require through the business facilities, the efforts of a full time man, they should certainly have one.

Q. Could that school be approved by the American Bar Association without any full time teacher or dean?

A. Yes, sir, it could.

Q. It could be?

A. Yes, sir; the requirement of one full time professor for each one hundred students isn't in the standards. It is an interpretation made by the Committee as a recommendation to the House of Delegates.

Q. So, it would vary?

A. If the Committee found it was adequate. What is the purpose of having one instructor for each one hundred, or less? The purpose is stated in the standards to be so that the professor will be acquainted with the needs and the studying of the student body. I would assume, and would so state, that if this school has less than 25 students, that [fol. 29] three or four professors who are full time professors, not part time, would certainly seem to be adequate.

Q. What would be—and maybe you can't answer this—what would be the minimum number of full time teachers, deans, that you would need?

A. At this time?

Q. Yes, sir.

A. With how many students?

Q. Well, assume we have one.

A. Well, I wouldn't see the slightest need for a full time professor to give his full time to this one student.

Q. And—then could that one student get the same type of education that other students get by having only the viewpoint of one professor?

A. I didn't understand that was to be the case. I understood they were to assign four.

Q. And you wouldn't need any full time, then?

A. I wouldn't think so. I would think; if he had the same capacity, he could get a better grasp of the principles of law than if he were one of eight hundred students with ten professors.

Q. Don't you require, in accrediting schools, that you have a full time professor, or professors, for the purpose of being available to the students during the regular day, throughout the day, for consultation? Isn't that true?

[fol. 30] A. No, the purpose, as I stated before, is so that there will be a sufficient number of instructors so that they will personally know each student and be available to encourage and teach him how to study law. Some of them don't know how to study law.

Q. I think we are talking about class room work. I am talking about after class. Isn't that the reason for a full time professor, so that he will be available in the afternoon for consultation?

A. No; so that they will have some chance to individually and personally know the students.

Q. And another question; do you know the difference between a law library and a teaching law library?

A. I don't know what you have in mind, if that is what the answer is.

Q. I will explain it. For example, under the requirements, the types of books that you have to have in a law school library aren't the books that are required, for example, in a Supreme Court Library?

A. Well, I don't think so. They lay more stress on the law reviews and things of that kind than the practicing lawyer does; or, I might say, used to, but the Supreme Court Library here has about everything a general practitioner would need.

Q. Does it have what a law school needs?

[fol. 31] A. I would say that depends on the course of study. I have known some law schools to give,—I think there is one that gives a course in patent law. I question whether that one would have facilities for teaching much patent law.

Q. A few others, too. The point I am trying to get at is that the law library is an important feature of a law school, a very important feature?

A. That is right.

Q. And the University of Texas Law Library has one of the best; isn't that true?

A. It has a very good library.

Q. And isn't it fully accredited by every association?

A. As far as I have heard.

Q. And does it not have a librarian and an assistant librarian?

A. Well, they had a librarian when I was there.

Q. And isn't it the only library in this section of the country that has microfilm reports of the records of the Supreme Court?

A. You had better ask the dean.

Q. If you are going to compare the two; aren't you forced to compare the two libraries?

A. I said, in my opinion, the Supreme Court Library, which is one hundred yards from your school, has more than any one, or twenty-five students, would possibly absorb in three years; and if he absorbed that, he would be competent [fol. 32] to start practicing.

Q. The answer is that the important thing is that it is not the number of books necessarily, but the right books that you will need?

A. Yes.

Q. And obviously, there are books at the University of Texas that are not in the library of the Supreme Court?

A. I can't answer that.

Q. There is a larger percent——

A. I will say that all I have read that qualifies me, if I am qualified to practice law, are in the Supreme Court Library.

Q. Do I understand you to say that the basis of your testimony is that the individual student can get as much in an inferior school as he can get in a superior school, if he is smart enough?

A. The inferior and superior are your words. I said, with the same instructors in the two schools, and the law books available in the Supreme Court Law Library, a hundred yards across the street, he can get an adequate legal education; at least as good as that of the student, one of seven or eight hundred, getting the similar courses out at the University of Texas Law School.

Q. But you don't think it is a mistake to put all of those books at the University of Texas Law School, do you?

A. That is not up to me to judge that. I haven't read all [fol. 33] of them.

Q. I don't imagine the librarian has. If the standards of the Association of American Law Schools are higher or more stringent than those of the American Bar Association, as you stated, as a member of the board, how could a student be said to be offered equal educational facilities in the basement across the street as he would at the University of Texas, assuming that the Association of American Law Schools requires a minimum of four full time teachers, irrespective of the number of students?

Mr. Daniel: We object to that question as argument; presuming the requirement of the American Association of Law Schools there, and for the same reason they objected to the requirements of the American Bar Association, we object to that question.

The Court: I think he can answer it.

A. It is a little involved. Break it down, if you can.

By Mr. Marshall:

Q. You stated before the requirements of the Association of American Law Schools were obviously more stringent?

A. I said they were slightly different. They require ten thousand, and the American Bar, seventy-five hundred. In the average case that has no meaning. The student won't study over 200 books in his courses.

Q. Have you ever taught school?

[fol. 34] A. I have lectured a few times.

Q. But you have never been a full time professor?

A. No, that is correct. I have been a practicing attorney.

Q. You have been a practicing lawyer?

A. Twenty-seven years.

Q. Are you familiar with the teaching curriculum now used in law schools?

A. Somewhat.

Q. Are you familiar with the teaching methods now, for instance, the case book, and the old outline method?

A. Yes, sir. The case book gives more stress to the work done by the student himself in reading, instead of the

professor reading and the student making notes, like he used to do twenty-five years ago.

Q. And he takes the case book——

A. And studies it himself.

Q. And he goes up in the library and reads the footnotes?

A. Yes, sir; and the law reviews.

Q. Incidentally, how many law reviews did you see in this library over here?

A. In the——

Q. At the Capitol?

A. I couldn't say. I have gone through a good many of them when I was in the Attorney General's Office.

Q. I am talking about today.

[fol. 35] A. I didn't see them. I am sure they are there.

Q. You don't know how many are there now?

A. No.

Q. Assuming the requirements of the Association of American Law Schools are more strict than those of the American Bar Association, and the University of Texas is a member of both, I think we can assume that is a fact. The Association of American Law Schools requires a minimum of four full time professors, irrespective of the number of students. Would you say a student at that school would get equal educational opportunity with the University of Texas?

A. I didn't qualify as an expert on law schools, and I, perhaps, as a practicing lawyer, do not lay as much stress on having as many full time law professors as most people. I think an occasional practicing lawyer mixed up in the faculty is a fine thing. The fact that the American Association of Law Schools wants more full time professors than the American Bar Association doesn't change my view. What we are talking about, affording the opportunity to a student, assisted by a preceptor who knows some law, can learn the principles of law and certainly one student, or ten, or twenty-five, assisted by four preceptors in law would have a better opportunity, if he has it within himself to develop, than one who was asked an occasional question every thirty days or so.

Q. The important thing is that if this proposed school used [fol. 36] in the first hypothetical question did not, and could not under those facts, meet the requirements of the Association of American Law Schools, and the University of Texas

does meet them; would you say that that is giving equal facilities?

A. It wouldn't have the slightest effect on the student, whether he was a trained lawyer when he left the school or not.

Q. Would that be equal?

A. Equal facilities for what? For him to acquire a legal education?

Q. No, sir.

A. Whether they were a member of the Association would be utterly immaterial.

Q. The question would be whether that would be facilities equal to the facilities at the University of Texas.

A. If you are talking about physical facilities——

Q. I am talking about the whole law school—both. Would you say that that law school that you saw today, even with the opportunity to use the Capitol library, afforded facilities equal to that that you have seen repeatedly at the University of Texas?

A. To one student?

Q. No, not limited to one student for this question. You may go back to one student next time.

A. Someone once said that Mark Hopkins, long-time pro- [fol. 37] fessor at Williams College, sat on the end of a log and taught a student on the other end of the log. It depends on the student and instructor, and what they are talking about. Whether they belong to an association or have complied with the standards, in my opinion, for this purpose, is utterly immaterial. If you have competent instructors with adequate books to teach that student, he can get his legal education.

Q. Mr. Simmons, let's start with——

A. I couldn't see how he could fail to get that if there were one or ten, where he couldn't get a better education than any ten you would get in the other school, because half of them, I regret to say, look out the window. It gets humid, as it is here in the court room, and he would get a little sleepy, and he looks out the window, and he couldn't do that if there were one or ten.

Q. Are you opposed to large law schools?

A. I am not advocating them. I am not impressed much by numbers, Mr. Marshall.

Q. Since you say we get equal facilities, in your opinion——

A. I didn't say that. I said he had an equal opportunity to get a legal education, is what I said.

Q. Could he get an equal opportunity to get a legal education in a law office?

A. I think so. The finest lawyers I have ever known, that picture of that one over there, for instance (referring to [fol. 38] photograph hanging in court room.)

Q. Mr. Simmons, if we can stay on the facilities——

A. All right.

Q. The best way to get on it is to take the concrete ones. In your mind, is there any comparison in value of the building where the University of Texas Law School is with the building across the street where the Negro school is supposed to be?

A. I think both of them could well be improved. The Texas Bar Association has been trying for years to get them to tear down the one at the University and build an adequate one.

Q. What do you mean by "adequate?"

A. For the number of students. It was built in 1907.

Q. Is the one across the street equal in monetary value?

A. Certainly not.

Q. Certainly not. Approximately how many professors do they have at the University of Texas Law School?

A. I don't know. The school has changed from fifty year before last to eight hundred and something now. I couldn't tell you.

Q. Is the library at the University of Texas Law School larger than the library at the Capitol, and the one in the Negro law school together?

A. Each one of them have, in my judgment, fifty thousand volumes, approximately. I don't know how many more. [fol. 39] Q. Fifty thousand in that law school over there?

A. At the Supreme Court approximately, I say.

Q. Approximately how many in the basement of that building?

A. I couldn't say. The Texas University Law School——

Q. No, the Negro law school?

A. They had about 200 books, I would say.

Q. What kind of books?

A. They seemed to have some books on torts and contracts and legal bibliography and Texas Law Review, and a few miscellaneous books of that character. They didn't

have any books that I saw, on equity, or on courses that you would give to post-graduates or seniors. These seemed to be, as far as these books were concerned, they seemed to be limited strictly to beginners.

Q. Did you see the American Digest there?

A. In this ground floor of the Colored Law School Building?

Q. Yes.

A. No, they were not there.

Q. The United States Supreme Court Reports?

A. They were not there.

Q. Any state reports?

A. They were not there.

Q. There were no reports there?

A. No.

Q. There were some case books and text books?

[fol. 40] A. Yes, and the Law Review. It was The Texas Law Review. I suppose they are partial to that one.

Q. Is that the only one?

A. That is all I saw. I wouldn't say the only one.

Q. Do you know the type of books required in an approved law school to be used in the first year courses?

A. These same books on torts, contracts and legal bibliography are the same ones used at the University of Texas.

Q. Don't they teach legal bibliography in the library, and use all of the books in the library?

A. That is where you learn it.

Q. Do you not teach legal bibliography in the library?

A. I couldn't answer that. Not when I went to school. They taught it in the class rooms.

Q. We are comparing these facilities as of today.

A. I have outlined at some length what I saw, and in my opinion, if a man wants to become a lawyer, so far as the books, the curriculum, and the professors are concerned, he can become a lawyer with what is offered him here. Some people want a big law library and a big school. I happen to have studied in night school and a law office, and this school. Perhaps I am not as impressed with a big school as some other people.

Q. I understand, but as one point in this case, the State makes an allegation that they are affording equal educational facilities, not equal opportunity to learn, necessarily.

[fol. 41] A. All I understood was that the State was re-

quired to furnish substantially equal facilities and opportunity to acquire a legal education. I am not arguing the law. I am not a lawyer in this case. I was just passing through the city. By reason of having been president of the lawyers from Houston to the United States, they asked me to talk about the standards. If you want me to argue about whether these facilities are worth as much as something else, you had better get somebody else.

Q. Hasn't the American Bar Association taken a specific stand urging the abolishment of all law schools not set up as parts of universities?

A. Well, they have taken a stand that they do not in general approve what they call the commercial law schools. I recall no resolution saying that they must be part of a university.

Q. You set all of the standards or ultimate goals?

A. They are recommendations.

Q. Didn't the American Bar Association cooperate with the Dallas Bar Association in taking all of the small law schools in Dallas and centering them at Southern Methodist University, the American Bar Association?

A. Some of our men, I am sure, helped with that. The schools there were commercial schools, the night schools, as I recall. I might add there is some movement on foot to do the same thing in Houston.

[fol. 42] Q. Go right ahead.

A. I have been asked by the President of the University of Houston if I won't discuss with them means by which they could take over one or two night schools in Houston, and those are commercial schools. The Houston Law School is a night school which I attended back thirty years ago. I would be very happy to see them a part of a university, personally.

Q. Do you know what hours the Capitol Library is open?

A. Not right now. I studied there many times, day and night.

Q. Do you know the hours?

A. I do not know.

Q. That is all.

Redirect examination.

Questions by Mr. Daniel:

Q. Mr. Simmons, the two smaller law schools that you mentioned which are recognized by the American Bar Association and the American Association of Law Schools, Howard University and Lincoln University, are they separate Negro law schools?

A. That is my understanding.

Q. As to the facilities, in your opinion, are the three class rooms that you have inspected, for the Negro law school, based on from one to ten students, equal as far as the opportunities for study and class room work are concerned, with three class rooms at the University of Texas for 850 students?

A. Well, we have seats, and the professor could do very [fol. 43] nicely here teaching ten or fifteen students. He certainly, I think, could get more into their heads than sitting with 300, and in the back row.

Q. Referring back to the question asked on cross examination as to whether you knew of any accredited law school that had its law library in a separate building, are you acquainted with the University of Michigan Law School?

A. I have been there many times.

Q. Are you acquainted with the location of the library building?

A. It is in the same quadrangle. It is in the W. W. Cook Library Building, across the quadrangle from the Law School. As a matter of fact, I at one time had an office in Hutchens Hall, a part of that building. Hutchens is President of the American Judicature Society.

Q. That is all.

Recross examination.

Questions by Mr. Marshall:

Q. Isn't there a connecting alcove between the Law Library and the Law School at the University of Michigan?

A. It is a large school, and it is a beautiful quadrangle of buildings. Hutchens Hall and W. W. Cook Library are very close.

Q. The same is true at Yale?

A. I am not so familiar there.

[fol. 44] Q. When you say Howard University is a Negro university or school, do you know that of your own knowledge?

A. All I say is that it was accredited as a colored law school.

Q. Do you know whether or not there are any other students prevented from attending there?

A. I don't know anything about it. All I know is that in the accredited law schools, Lincoln and Howard are listed as colored law schools.

Q. That is in the American Bar Association listing?

A. That is what I was being asked about. Would you like to see that?

Q. No. I was there when it was accredited. How long will it be, assuming your hypothetical school here,—I mean, involved in the hypothetical question——

A. Don't say my hypothetical school.

Q. I withdraw that. That school that you went in today over here across the street?

A. I don't think anything is a school until it has got some students. The building where I was today?

Q. That the building, if it should be opened as a school, how long would it have to operate before the American Bar Association would be in a position to accredit it?

A. I think preferably it ought to wait and operate long enough to see if the student body was seriously interested in studying law, or if they had some other purpose, and then if [fol. 45] it complied with the standards, it would be given a provisional approval.

Q. Can we stop there and see about how long that would be?

A. I can't say. I have known of instances where, for instance, I believe St. John's University in New York, Brooklyn, was kept on provisional approval for two years; and I believe the University of Georgia Law School was put on provisional approval when it had some difficulty with a gentleman named Talbot.

Q. How long after the provisional approval until you get it on the entire approval?

A. I would say two years.

Q. That is all.

Mr. Daniel: That is all.

(Witness excused.)

Mr. Daniel: I would like to make a statement as to the order of our evidence, now that we have Mr. Simmons excused. You will excuse him?

Mr. Marshall: Certainly.

Mr. Daniel: We first wish to offer the—call the attention of the Court to Senate Bill 228, which authorized A. & M. College to set up a law school at Prairie View, and then to offer the resolution on that college, authorizing the establishment of it, and a deposition showing what was done [fol. 46] under the bill, in order that the record might be complete, since the filing of this suit, as to how the State has attempted to meet its obligation; and then we will go into the new school here in Austin.

At this time we offer the resolution of the Board of Directors of A. & M. College, dated November 27, 1946.

Mr. Durham: That is the same resolution that was introduced on the trial before.

Said instrument was admitted in evidence as Respondents' Exhibit No. 2.

Mr. Daniel: We next wish to offer from the deposition of E. L. Angell the agreement of counsel as to waiver of formalities in the taking of this deposition, and I will ask Mr. Littleton if he will read the direct answers. I will propound the questions that were submitted by the State, by the Respondents, to Mr. Angell.

The following agreement of counsel ordered copied into the record at this point.

In the 126th District Court of Travis County, Texas

No. 74,945

Heman Marion Sweatt

vs.

Theophilus Shickel Painter, Charles Tilford McCormick, Edward Jackson Mathews: Board of Regents, Dudley K. [fol. 47] Woodward, Jr., E. E. Kirkpatrick, W. Scott Schreiner, C. O. Terrell, Edward B. Tucker, David M. Warren, William E. Darden, Mrs. Margaret Batts Tobin, and James W. Rockwell

The parties to the above entitled and numbered cause, through their attorneys of record, agree that the deposition

of Respondents' witness, E. L. Angell, who resides at Bryan, Brazos County, Texas, may be taken without the filing with the clerk of said court of notice of intention to apply for commission to take the answers of such witness to interrogatories attached to such notice, or service of copy thereof, and of the attached interrogatories, or five days' time before issuance of commission, as otherwise required by law, and further agree that a commission to take such deposition shall be issued by such clerk immediately, and that such deposition shall be taken as provided by law in accordance with such commission and the attached direct and cross interrogatories by any officer authorized thereto by law at any place where the witness may be found and returned in the statutory manner for use as evidence in the trial of such cause, and further agree that when such deposition is returned it may be so used, subject to all other legal objections, at the trial of such cause.

Price Daniel, Attorney General of Texas, by (s.) [fol. 48] Jackson Littleton, Assistant Attorney General, Attorneys for Respondents. By (s.) W. J. Durham, Attorney for Relator.

The following was read into the record, Mr. Daniel reading the Direct Interrogatories, and Mr. Littleton reading the answers, from Deposition of E. L. Angell.

E. L. ANGELL, (Deposition.)

Direct Interrogatories to be propounded to E. L. Angell, Secretary of the Board of Directors of the Agricultural and Mechanical College, a witness for Respondents in the above entitled and numbered cause, for the taking of his deposition:

Q. 1. What is your name?
A. 1. E. L. Angell.
Q. 2. Where do you live?
A. 2. College Station, Texas.
Q. 3. What is your position or employment?
A. 3. Assistant to the President of the A. & M. College and Secretary to the Board of Directors.
[fol. 49] Q. 4. How long have you held such position?
A. 4. Assistant to the President since June of 1941, with the exception of about two years in the Army. Secretary to the Board since January of 1946.

Q. 5. State whether you are the same E. L. Angell who testified in a hearing of the case, Sweatt v. Painter, on December 17, 1946.

A. 5. I am.

Q. 6. State whether you are familiar with the provisions of a resolution adopted by the Board of Directors of the Agricultural and Mechanical College on the 27th day of November, 1946, being Minute Order No. 203-46, and entitled The Establishment of Law Course for Negro Students.

A. 6. I am.

Q. 7. State if you are the same E. L. Angell who certified to said resolution by testimony in the hearing of the case of Sweatt v. Painter on December 17, 1946.

A. 7. I am.

Q. 8. State who, if anyone, was assigned the responsibility of carrying out the purpose of the resolution.

Mr. Durham: Just a minute. We object to that answer for the reason that the resolution would be the best evidence of its contents. The resolution is in evidence before this Court.

The Court: I think that is true.

[fol. 50] Q. 9. State what, within your knowledge, was done to carry out the provisions of said resolution.

Mr. Durham: Your Honor, we want to ask that, until I make my objection, Mr. Littleton be asked to stop at the word "renovated."

Mr. Littleton: Do you mean as to all of the other paragraphs?

Mr. Durham: We have no objection to any portion of it down to there.

Counsel and the Court conferred off the record regarding said answer.

Mr. Daniel: Just read it to the Reporter, and let him get exactly what you say.

A. 9. A suite of rooms in an office building at 409½ Milam Street, Houston, Texas, was secured. These rooms were completely renovated. This suite of rooms was furnished with new furnishings purchased for that purpose.

The services of Attorney William C. Dickson were secured as a teacher for the law courses.

Immediately available were some 400 basic law reference books. A list of books required for first year law students

was furnished by the Dean of Law at the University of Texas. It was ascertained from a law book firm that these books could be delivered to Houston on 24 hours' notice. [fol. 51] The immediate supervision was under the direction of the Principal of Prairie View University, Dr. E. B. Evans.

Q. 10. State whether any building or housing facilities were acquired.

A. 10. Yes; suite of offices at 409½ Milam Street, Houston, Texas.

Q. 11. If you have stated that building and housing facilities were acquired, state the location of such facilities, and describe them fully.

A. 11. Suite of three rooms at 409½ Milam Street, Houston, Texas, which was an office building.

Q. 12. State whether anything was done to secure professors for the instruction of the law courses mentioned in the resolution.

A. 12. William C. Dickson was employed.

Q. 13. If you have stated that anything was done, then state what arrangements were made, and the names of individuals with whom they were made.

A. 13. William C. Dickson was employed, to teach the law courses, the supervision of the establishment was under the direction of Dr. E. B. Evans, Principal of the Prairie View University.

Q. 14. If you have stated that any instructors and professors for the law courses mentioned were secured, then [fol. 52] state the names of those secured and the qualifications of each.

A. 14. William C. Dickson was employed to teach the law courses. He is a practicing attorney in Houston. His training includes Bachelor of Arts degree from Pomona College of California, the Bachelor of Law degree from Harvard University, and the Master of Law from Boston University. In case of need of an additional teacher Dickson's partner; H. S. Davis, Jr., was available. He holds an A. B. degree from Morehouse College, Atlanta, Georgia, and a *J. D.* degree from Northwestern University.

Q. 15. State whether any library facilities were obtained.

A. 15. Yes, as stated in answer to Interrogatory No. 9.

Q. 16. If you have stated that library facilities were obtained, then describe fully the kind of facilities secured.

A. 16. Yes, as stated in answer to Interrogatory No. 9.

Q. 17. If you have stated that a law school or law courses were provided pursuant to the resolution of November 27, 1946, then state when they were provided.

Mr. Durham: Your Honor, we object to that as not being responsive to the question asked. He asked him when it was established, and he said available. He doesn't answer that question.

[fol. 53] The Court: Yes, I think that is right.

Mr. Daniel: All right; sir. We withdraw that Question 17.

Q. 18. If you have stated that a law school or law courses were provided, then state whether such school or courses were open for registration to qualified applicants.

Mr. Durham: Your Honor, we object to that answer for the reason the answer is "the law course was available." He gives no dates or time, and it is not responsive to that question. It isn't even intelligible.

The Court: It doesn't seem to be responsive, or even helpful.

Mr. Daniel: Your Honor, it says whether or not it was open for registration of qualified applicants. I don't know if the fact that it was available——

The Court: He could have said yes or no.

Mr. Daniel: Yes, he could.

Q. 19. If you have stated that such school or courses were open for registration to qualified applicants, then state the dates that such registration was opened and closed.

A. 19. It was opened on the 1st of February, 1947, and closed on the 14th day of February, 1947,——

Mr. Durham: Follow it on out; "* * * which was four [fol. 54] days longer * * *——"

The Court: That portion of it isn't responsive.

Q. 20. If you have stated that registration for a law school or law courses was opened and have given the dates, then state whether during such period any applications for registration were made.

A. 20. No qualified applicants applied.

Mr. Daniel: That is all we wish to offer until we see what you are going to offer on cross.

The Court: You spoke about some stipulations you will work out. Perhaps you will be able to work out something on that.

Mr. Durham: We don't intend to offer the crosses at this time.

Mr. Daniel: We wish to offer some of them, then. From the deposition of Mr. Angell we wish to offer the following questions and answers from Cross Interrogatories propounded by Relator.

Mr. Daniel read Cross Interrogatories, and Mr. Littleton read answers, from Deposition of E. L. Angell, as follows:

Q. 1. By what authority was a Law School for Negroes in Houston set up?

Mr. Durham: When he gets down to the word "and" I want to object to it. The resolution is the best evidence. [fol. 55] The Court: That is right.

Mr. Daniel: You are asking him for it at this time.

The Court: I believe he can state the law, and the resolution. The resolution is in.

A. 1. The law course for Negroes was established under authority of Senate Bill No. 228 of the 49th Legislature, and a Resolution of the Board of Directors of the A. & M. College of November 27, 1946.

Q. 2. What action, if any, did Prairie View University take in accordance with said resolutions in setting up a Law School for Negroes in Houston?

A. 2. The Principal of Prairie View University, Dr. E. B. Evans, was charged with details of setting up the law course.

Q. 3. How much money was expended in setting up this Law School for Negroes in Houston?

A. 3. I do not know.

Q. 4. Were books, equipment and supplies for this Law School for Negroes in Houston purchased for cash or by State requisition or vouchers?

A. 4. They were purchased by Prairie View University, using their funds.

Q. 26. What salary agreement was made with each teacher? If the agreement was written, attach a copy of the [fol. 56] same to this deposition.

A. 26. Dickson was to be paid at the rate of $5,000.00 per year. The agreement was made by Dr. E. B. Evans of

Prairie View University and I do not have a copy of the agreement.

Q. 27. What salary was paid each of these teachers?

A. 27. He was paid at the rate of $5,000.00 per year.

Q. 29. How much time was each teacher required to give to the work of the Law School, that is, state whether the teachers were to give part time or full time and if part time, exactly how many hours per day, per week.

A. 29: Full time if necessary.

Q. 41. When was this library purchased and what was its purchase price?

Mr. Durham: We want to object to that word "available". He asked him what he purchased, and it is not responsive.

The Court: Let me read it.

Mr. Durham: We object to the entire part of it after we leave the word "made", —"Some 400 basic reference law books were made * * *"—

The Court: Let him put the question again.

(Mr. Daniel read Question 41 as set out above.)

The Court: I don't believe that is responsive.

Q. 42. How many library stacks or book cases were ac-
[fol. 57] quired, and what kind?

Mr. Durham: We object to that as not being responsive.

The Court: It is not responsive.

Q. 45. Give the name and qualifications and salary of each of these officers of the Law School for Negroes in Houston:

(a) Dean
(b) Registrar
(c) Librarian.

Mr. Durham: We object to that for the reason the answer is not responsive.

The Court: He doesn't appear to answer it at all. I will give you your bill on it.

Mr. Durham: Is that No. 45, Your Honor?

The Court: Yes, I am giving you your point on that.

Mr. Durham: We object to that for the reason it is not responsive. He doesn't name anybody.

The Court: I think perhaps if you will break it up a little, it might be responsive. He might say the dean and registrar

were officials of Prairie View University. It is going to be difficult to understand. I will give your point on it.

A. 45. The Dean and Registrar were officials of Prairie View University and Prairie View University was to furnish [fol. 58] librarian services at the Houston establishment.

Q. 49. State what courses of instruction were offered in the Law School for Negroes in Houston in detail, as follows:

(a) Name of course.

(b) Case book and text book used.

(c) Hours per week classes scheduled to meet.

(d) Time of day each class scheduled to meet and the number of the room in which it was to meet.

(e) The number of semester or quarter hours credit to be given for each course.

Mr. Durham: We object to that as being a conclusion of the witness.

The Court: And it isn't responsive either.

Mr. Durham: And it isn't responsive.

Q. 53. Did the faculty of the School of Law for Negroes in Houston prepare the curriculum, schedule the classes and otherwise conduct the general educational work of the law school?

Mr. Durham: We object to that. It isn't responsive.

The Court: I think it isn't responsive.

Q. 58. Is this Law School for Negroes still in existence in Houston?

Mr. Durham: We object to that. That isn't responsive.

The Court: The first sentence ends it; yes.

[fol. 59] Mr. Durham: The first sentence.

A. 58. The facilities weretrented until the 1st of March.

Mr. Daniel: All right, that is all. We wish to call the attention of the Court to Senate Bill No. 140 of the 50th Legislature, and briefly to review that before we put on the evidence that follows that.

The Court: I think we will take that up in the morning.

(Court was recessed at 4:30 p. m., May 12, 1947, until 9:00 a. m., May 13, 1947.)

Morning Session

May 13, 1947

9:00 A. M.

Mr. Daniel: May it please the Court, I would like to call attention of the Court to Senate Bill No. 140 of the 50th Legislature, which became effective March 3, 1947. Rather than read the sections that have to do with the establishment of the State University for Negroes in Houston, Texas, I will go over those paragraphs and summarize them, if that is all right with the Court.

(Counsel at this point summarized portions of said bill.)

[fol. 60] I would like to call Mr. D. K. Woodward.

D. K. Woodward, Jr., a witness produced by the Respondents, having been by the Court first duly sworn as a witness, testified as follows:

Direct examination.

Questions by Mr. Daniel:

Q. State your name, please, sir.
A. D. K. Woodward, Jr.
Q. Where do you live, Mr. Woodward?
A. Dallas, Texas.
Q. And what is your business?
A. I am a lawyer.
Q. What, if any, official capacity do you have with the University of Texas?
A. I am a member of the Board of Regents, and Chairman of that Board.
Q. How long have you been Chairman of the Board of Regents of the University of Texas?
A. Since the end of November, 1944.
Q. Have you, since becoming Chairman of the Board of Regents of the University of Texas, acquainted yourself with the matter of education for Negroes in Texas?

A. To the best of my ability, yes, sir.

Q. Are you acquainted with Senate Bill No. 140, which [fol. 61] I have just outlined to the Court?

A. Yes, sir, I am.

Q. I will ask you if you had anything to do with the preparation of the bill, and especially the part that the University of Texas—as relates to the University of Texas?

Mr. Durham: We object to it unless he shows he is a member of the Legislature.

The Court: I think that would be correct.

By Mr. Daniel:

Q. Were you acquainted with the terms embodied in that bill before they were actually enacted by the Legislature?

A. I was.

Q. Have you studied the terms of this bill, when the bill was pending in the Legislature, and before final passage of it?

Mr. Durham: We object to that as being immaterial.

The Court: I think it is immaterial what he did about it.

Mr. Daniel: Your Honor, we are simply leading up to show the University Board met in anticipation of the final passage of this law, and began their actions a few days before the law became effective.

The Court: He can tell what his Board did.

Mr. Durham: We don't think that anything that a citizen did would be construed, or the Court could presume it would influence the Legislature. I think that would be a [fol. 62] reflection upon the Legislature.

The Court: I sustain the objection.

By Mr. Daniel:

Q. Did that Board have a meeting prior to the time that this bill was finally passed by the Legislature?

A. Yes, the Board met the 28th of February.

Q. 1947?

A. Yes.

Q. Had the Senate Bill 140 already passed one branch of the Legislature?

A. Two branches, both.

Q. Both branches?

A. It had passed in the Senate on the 24th, the House on the 27th, with certain amendments, and it was in that state that the bill was laid before the Board at its meeting on the 28th of February.

Q. Did you as Chairman lay the bill before the Board?

A. I did.

Q. Did the Board of Regents of the University of Texas on the 28th of February study the requirements made of you by the bill?

A. Yes.

Q. What, if anything,—did you pass any resolutions at that time?

A. We did.

Q. Do you have a copy of the resolutions?

[fol. 63] A. I have.

Q. Is this a true and correct copy of the resolution passed by the Board of Regents on the 28th of February?

A. It is.

Q. We wish to offer it.

(Said instrument was admitted in evidence as Respondents' Exhibit No. 3.)

Q. Now, Mr. Woodward, in accordance with that resolution, I will ask you whether or not you proceeded to establish the separate law school therein called for?

A. We did.

Q. Where was it established?

A. On East 13th Street, in the City of Austin, immediately adjoining the Capitol grounds on the north. I think the number is 104 East 13th.

Q. What kind of building do you have there, as far as classrooms are concerned? How many classrooms do you have in the building where the law school is located?

A. Presently available we have four buildings—four rooms, three of moderate size, and a fourth small room for a reception room, and the small toilet facilities.

Q. Did you, in accordance with that resolution, give certain instructions to Dean McCormick, Dean of the University School of Law?

A. I did.

[fol. 64] Q. Will you state to the Court what instructions you gave him as to his part in this school?

A. I requested through the Dean of the entire personnel of the Law School an expression as to their willingness

or not to teach in the proposed new law school. It was reported to me that they were unanimous——

Mr. Durham: We object to that.

The Court: Yes. That would be hearsay. We will sustain the objection to whatever was reported to him. He can testify to what he knows.

A. All right. I had a conference—a number of conferences—with Dean McCormick concerning the establishment of the law school and requested him to give us the, provide the curriculum and the instructors called for in carrying out the resolution.

Q. As to the location of the law school of the State University for Negroes, the building that you have spoken of, how far is that from the Capitol grounds?

A. It is about a hundred yards from the north door of the Capitol.

Q. You are talking now about the Capitol Building?

A. Yes,—from the Capitol grounds?

Q. Yes.

A. I would say 20 feet. It is a very narrow street there, East 13th Street.

[fol. 65] Q. Between the location of the law school and the Capitol grounds?

A. Yes.

Q. You mentioned something about another distance, as between the door of the separate law school and the State Capitol Building. If you know, how far is that?

A. I would estimate it to be a hundred yards, 300 feet.

Q. Where is the law school located with reference to the University of Texas?

A. Well, the University of Texas lies north of 21st Street in the City of Austin, covers a considerable area out there. That would be eight blocks north of the new law school on 13th Street.

Q. Then your new law school is located between the State Capitol Building and the University of Texas Campus?

A. That would be right.

Q. Where is—state how the new law school is located with reference to the business district of Austin; is it nearer the business district than the University of Texas Law School or not?

A. Yes, sir; eight blocks nearer.

Q. Is your new law school nearer the banks of Austin and other business facilities than the University of Texas?

A. It is eight blocks nearer.

Q. Are you acquainted with the State Library called for in this bill, in the Capitol Building?

[fol. 66] A. I am.

Q. Are you acquainted with the location of that library?

A. I am, the second floor of the Capitol Building, north wing.

Q. Are you acquainted with the space therein, and desks, as to availability of the space and working room in that library for students?

A. I am, and have been for many, many years. I have frequented it myself.

Q. That is on the second floor of the Capitol Building?

A. Yes.

Q. Are you acquainted with the Texas University Library and the facilities thereof?

A. No, I am not, not as closely as I should be. I know in a general way what it is.

Q. Are you acquainted with the working room at the University of Texas Law School Library, not the books?

A. I couldn't say that I am with any degree of accuracy. I know they are sorely pressed for space.

Mr. Durham: We object to that as not being responsive.

The Court: Yes.

By Mr. Daniel:

Q. This resolution calls for the establishment of the same courses, a curriculum consisting of the same courses in law as those offered at the University of Texas?

A. It does.

Q. Did you or not give instructions to the Dean of the [fol. 67] University of Texas Law School to establish such a curriculum?

A. I did.

Q. The resolution also calls for the use of the same faculty members. I will ask you if you gave instructions in accordance with the resolution to the Dean of the University of Texas Law School with reference to the use of the University of Texas Law School faculty members?

A. I did.

Q. Was the new law school placed in readiness for operations on March 10, as called for in the resolution?

Mr. Durham: We object to that as a conclusion and opinion.

The Court: He can say what was done.

By Mr. Daniel:

Q. Will you just state to the Court what was done with reference to having the school ready for registration, as far as you know?

A. By March 10th?

Q. Yes.

A. The premises were put in order for it, cleaned up, painted, and the desks and chairs and certain law books placed in there, and an attendant placed in charge, and notices were sent as directed in the resolution to all persons interested, and there was considerable newspaper publicity given so that we did everything that——

Mr. Durham: When he said he did everything——

[fol. 68] The Court: Yes. He can say what he did.

A. Yes. All of the actions called for in that resolution, to the best of our ability——

By Mr. Daniel:

Q. They were accomplished by March 10th, were they?

A. That is correct.

Q. The resolution authorizes you to purchase a permanent law library for the school which will meet the standards set by the American Association of Law Schools?

A. Yes, sir.

Q. I will ask you what you did in accordance with that provision of the resolution?

A. I made requisition on the Board of Control of the State of Texas on March 1st, I think it was, either February 28th, or March 1st. The document itself would show the exact date, calling for bids at the earliest practicable date for a list of books purporting to be a complete list as called for by the American Association of Law Schools.

Q. Who did you have prepare that list to meet the standards of the American Association of Law Schools?

A. The Dean of the Law School of the University of Texas, Dean McCormick.

Q. The list that was prepared by him, or under his direction, then, was turned over to you?

A. It was presented to me in the regular course for the [fol. 69] execution and delivery of a requisition on the State Board of Control, as required by law, for the purchase of public property.

Q. Did you execute that requisition?

A. I did, immediately on either the 28th of February or the 1st of March; executed that and filed it with the Board of Control.

Q. I believe that is all.

Cross-examination.

Questions by Mr. Marshall:

Q. Judge Woodward, as long as you have been a member of the Board of Regents of the University of Texas, has it or has it not been the policy and custom of the University of Texas not to admit Negroes to any branch thereof?

A. There has been no custom of that kind, within my knowledge. The application of the relator in the spring of 1945 is the first application that I can recall, and I have been connected with the University one way or another for fifty years this coming fall.

Mr. Daniel: 1946, wasn't it?

A. 1946, the fall or spring of the year, whenever it was that he made his application, 1946, I believe it was.

By Mr. Marshall:

Q. Do you know anything about the application of one George Allen to take accounting, between the years 1938 to 1940?

A. I do not.

[fol. 70] Q. Well, why was the application of Heman Marion Sweatt to attend the Law School of the University of Texas refused?

A. Under the provisions of Section 7, Article 7 of the Constitution of Texas, pursuant to the advice of the Attorney General of Texas.

Q. And on that basis his application was refused; is that correct?

A. Correct.

Q. Is it or is it not the policy of the regents of the University of Texas to follow that section of the Constitution?

A. It certainly is, as long as it remains in the Constitution.

Q. Have you been over to this new law school?

A. I have.

Q. How much—how was the building obtained, by lease?

A. Under lease from the—through the Board of Regents of the University.

Q. And when was it leased?

A. It was leased around the end of February or the first of March of this year.

Q. For how long was it leased?

A. For the period ending August 31, 1947, August 31st of this year. I may say, if you are interested, that we are negotiating now and have the refusal of the building for the year ending August 31, 1948.

Q. When you say the building, as a matter of fact, you [fol. 71] don't have the whole building leased, do you?

A. We do not at the present time. We have a refusal of the remainder of the building when need for it arises. We have the first floor leased.

Q. The first floor is the ground floor, isn't it?

A. That is right.

Q. And there are comparatively, for classroom purposes, they are small rooms, are they not?

A. It depends on the size of the class.

Q. If you use the whole building that you do not now have, but if you obtained the whole building, could you put the library of the Law School of the University of Texas in that whole building?

A. Certainly not.

Q. So, that brings us to the next question. Where are you going to put your library?

A. When the library is acquired, it will consist of ten thousand volumes. The library of the Law School of the University of Texas consists of approximately 65,000 volumes, of which about half of them are duplicates. Nobody in his right mind would undertake to assemble 65,000 volumes in a law library in a building or law school just started. There is ample space in the building on which we have the refusal in which to store and provide the use of ten thousand volumes we have under order. We can put them there.

[fol. 72] Q. Then I understand you can put the 10,000 volumes in the present building?

A. That would be my judgment, yes.

Q. Well, now, as to these standards of the Association of American Law Schools, do you have enough space to give the amount of space required for library use of students?

A. As to that, I wouldn't be qualified to say because I don't know what the requirements are. We have with the —under the provisions of the statute, with the law library we have under order and with the accessibility to the Supreme Court Library of the State of Texas, we have abundantly sufficient library facilities and working space for the relator's pursuit of his course of law.

Q. Now, have you taught law?

A. Yes.

Q. When?

A. I would say it was about, must have been 20 or 25 years ago. I was for a short time a member of the law faculty of the University of Texas.

Q. And since that time have you done any teaching?

A. No.

Q. Are you familiar with the modern methods of teaching in law schools?

A. I believe I am, with what you term the modern methods. I happen to be a graduate of the University of [fol. 73] Chicago Law School in the class of 1907. I went there at the time it was being organized. Joseph Henry Beal, a great educator from Harvard, came out and established the case system, and it was because of the establishment of that system, in part, that I took my three years of law work there.

Q. What I am getting at, Judge Woodward, is that when you make the statement that he can get an adequate legal education on the facilities that have been provided, I want to know whether or not you are talking as an expert in the field of education.

A. I am talking as a man familiar with what it takes to provide a thorough training in law in the State of Texas, and I stated the facts within my own personal knowledge, that the facilities which the Board of Regents of the University set up in accordance with Senate Bill 140 are such as to provide for the relator in this case the opportunity for the study of law unsurpassed any time elsewhere in the

State of Texas, and fully equal to the opportunity and instruction we are offering at the University any day.

Q. Are the facilities in that school equal to those in the Law School of the University of Texas?

A. Do you mean the physical facilities?

Q. First, the physical facilities?

A. They are not identical.

Q. Are they equal?

[fol. 74] A. For the purpose they are, yes, sir.

Q. What is the value of the Law Building at the University of Texas?

A. It is an old building. I would say it was constructed 40 years ago. I don't know whether you are talking about the replacement value or original cost, but, of course, the leasehold there has no relation to the physical value of the University of Texas Law School proper.

Q. What I wanted to know was in dollars and cents, using whichever method you want to use, original purchase price, or price to reproduce. Is it not true that you can not even compare the value of those two buildings?

A. Well, they don't bear any relationship to each other. One is a leasehold adequate for the purpose for which it was obtained, and the other is a property in fee. You are correct in this, that there is no fair comparison in monetary value.

Q. Next, as to the library that you have on requisition, does that compare in value with the library facilities at the University of Texas Law School?

A. The library on order, and the library made available by law to the relator, had he entered the school, compare very favorably with the library at the University of Texas. You will understand that there may be a few more volumes at the University of Texas, but an examination would reflect that there are many, many duplicates, as there would have [fol. 75] to be with a student body of eight hundred or so.

Q. Do you not also know that several of the sets of books required under the rules of the American Association of Law Schools are now out of print?

A. I wouldn't know.

Q. You don't know anything about those standards?

A. I don't claim to be an expert on that. I don't admit complete ignorance about them.

Q. Didn't you testify, or rather, I will ask you the question; will this law school set up over here for Negroes meet

the requirements of the American Association of Law Schools?

A. Well, it will do that, in my judgment, in the process of its development. The facilities and instruction presently provided in contemplation of the registration of the relator were made in accordance with the requirements of the American Association of Law Schools, as I understood it. You will understand, of course, that I rely upon Dean McCormick, who is a very well known and eminent legal educator, as to matters of that kind. I depended on him for that. I have no reason to question his ability as an advisor in that regard.

Q. These 10,000 volumes; do you have a copy of that requisition with you?

A. No, I don't have it. It is available. It is at the Board of Control, or may be in the court room. I filed the original with the Board of Control.

[fol. 76] Q. What has happened to that requisition?

A. The notices were sent out in the regular way. I am speaking now from recollection as to dates, and the bids were to have been opened on some date in April, and for some reason they were—of course, you understand, I have got to tell you now what was reported to me about it. If you object, I won't tell you.

Q. That is all right, sir.

A. It was reported to me that for some reason, in the machinery of the purchase, they had to be delayed. You will understand further that once the authorities of an educational institution file a requisition as required by law, that its execution then rests with another department, the Board of Control. That is part of our Texas administrative system. I have every reason to believe that those books have been, or will be purchased in the immediate future. It is quite possible that the Board of Control has already purchased them.

Q. Are they in the law school now?

A. No.

Q. They are not there as of today?

A. No, sir, neither is the relator.

Q. They were not there on March 10th, were they?

A. No.

Q. As a matter of fact, how many books were there on March 10th?

A. Oh, I would judge in that——

[fol. 77] Q. First of all, did you see the place March 10th?

A. Either that, or a day or two before.

Q. All right, sir. How many books were there?

A. I would estimate 150 or 200.

Q. And what volumes were they, generally?

A. I don't know. I have a great many things to do, you will understand, counsel; that we had taken the precaution of making the entire library of the Law School of the University of Texas, eight blocks away, available on a loan basis, so that if the relator had come, as we hoped he would, he could have had access through loan immediately to any books in the Law Library of the University of Texas; the Library of the Supreme Court of Texas, for any course he wanted to pursue.

Q. Isn't it true that the students of the University of Texas Law School also have access to the Capitol Law Library?

A. I think that they, in common with every citizen in Texas, have a right to go in there.

Q. So that there is nothing special about that, is there?

A. Yes, there is; for this reason——

Q. What is the special thing?

A. The Legislature of Texas, which is the policy making body of the State of Texas, saw fit in setting up this general plan for Negro education, to provide specifically that the students there should have the use of that library for the purpose of attending classes at the law school. Now, I, and [fol. 78] every other citizen in the State have to have the use of that library for general purposes, but I do not have it for use as a student in that law school. So as to relieve any question about it, that provision was put in the bill.

Q. But as the situation now stands, the right granted by that bill is the same right which every other citizen has?

A. Well, if you think that as a lawyer, that is all right. It is not the case. If that is your judgment as a lawyer, that may be good New York law, but it is not good Texas law.

Q. For the record, may it be stated that I am not a member of the New York Bar.

A. Whatever bar you are a member of, that is not true in Texas.

Q. Let's get this straight. In Texas, Sweatt can go over

and use the library now, and he isn't a student in any school; isn't that correct?

A. Yes, sir.

Q. Can't anybody in this court room go over and use that library, regardless of what school he is in; isn't that correct?

A. He can go over and use it for the purposes as an ordinary citizen of the State.

Q. What peculiar purpose does a student use a law library for that any other person does not?

A. Withdrawing books to study.

Q. Is there anything in the statute which gives him the [fol. 79] right to withdraw books?

A. I think the Legislature wouldn't have considered that necessary when they gave them the right to use it as students.

Q. Is there any provision in the statute which specifically gives the students of that school the right to withdraw books?

A. I think there is not.

Q. And the students of the University of Texas can use that library?

A. Oh, yes, just as any other citizen can.

Q. And as I understand, the plan is proposed that if any other books are wanted, they can be brought over from the University of Texas Law Library on a loan basis?

A. At any time they are needed.

Q. How are they going to bring them over there?

A. Well, the University of Texas has facilities to do what it is required by law to do. We brought the other books down there. There is nothing difficult about that. We transact a very large amount of practical business, and that would be a very insignificant task.

Q. You brought down the 150 books when the school was opened?

A. I think so.

Q. As a matter of fact, wasn't it just five book shelves?

A. I think it was two of those racks of cases. I am not sure about it.

[fol. 80] Q. Is there any office space in there for professors in the present building?

A. You mean private offices?

Q. Yes, sir.

A. I wouldn't say there is any private office.

Q. Is there any private office for the Dean?

A. No.

Q. Are there any working rooms where students can work and confer with library books?

A. You mean work with the library? There will be plenty of room for that when the library is installed there, because we will have the remainder of the building.

Q. You say there were four rooms, three moderate size, and one small one?

A. As I recall, yes. I have a plan of it. I can tell you in a minute how many there were, and what size, if you are interested.

Q. I am quite interested.

A. All right. The building faces south. The entrance hall with the administrative desk in it is immediately to the west of a reading room and office, which is 15 feet, 7 inches, by 19 feet, 10 inches. To the north of the entrance hall there is a class room 11 feet, 6 inches, by 16 feet, 6 inches, and on the northwest corner of the building is a class room 12 feet by 12 feet, 8 inches. There is, in addition, a toilet [fol. 81] facility in the building. Those are the four rooms currently under lease.

Q. Do you have any objection to us putting that in evidence?

A. None whatever.

Q. May we see it?

A. I didn't make it myself. It was made under the—if you are willing to accept it as accurate. It is accurate.

Q. May we look at it a minute?

Mr. Daniel: Yes.

By Mr. Marshall:

Q. You don't propose to get 10,000 volumes in that space, do you?

A. Certainly not.

Q. And whether or not you will have space for the 10,000 volumes depends on whether or not you renew your lease, and whether or not you get the balance of the building; isn't that true?

A. Yes, we would have—the provision for that has already been arranged. I have arranged to renew the lease, the lease on the present quarters for the coming year ending August 31, 1948, and to secure the remaining portion

of the building when needed, for the period ending August 31, 1948.

Q. When did you say the Law School at the University of Texas was built, about?

A. I think about 1906 or 1907.

Q. Approximately how many students were going to the [fol. 82] law school the first year?

A. I could not tell you to save my life.

Q. It was a very small number, wasn't it?

A. It was a relative number. You had better get somebody who knows. The Registrar can tell you, because I could not tell you at all what the registration in the law school there was at that time. Of course, the records show it for each year.

Q. Do I understand correctly that the law school as it appeared on March 10th obviously did not meet the requirements of the Association of American Law Schools?

A. Well, that would call for a conclusion, depending on a great many things; the number of students, the work that they undertook, and a good many other considerations. You will see, after all, the regulations of the American Association of Law Schools and the American Bar Association have to be construed with some degree of regard for the facts. What we set up there was a plant fully adequate to give the very best of legal instruction for the only man of the Negro race who had ever applied for instruction in law at the University in about 63 years of the life of the school. We are practical people. We made that provision fully adequate for that purpose.

Q. What do you mean by "practical"? You mean within the money you had available?

A. No, here is what we were trying to do, Counsel. We [fol. 83] were trying very hard to, and are still trying to set up for Negro population of the State of Texas a University really of the first class, which down through the years will develop and grow to what we hope to be the greatest University for Negroes in the world. We have the assets with which to do it, and the determination to do it, and that was a part of the plan to provide here at the threshold of this undertaking opportunity identical with that which was afforded at the University, eight blocks away.

Q. Well, you didn't get the idea and that plan until after this lawsuit was filed, did you?

A. It happens you are mistaken about that.

Q. I would like to know.

A. On the 13th of January, 1946; the Board of Directors of the University of Texas, and the Board of Trustees,—Board of Regents of the University of Texas, and A. & M. College met in joint session at Ft. Worth, Texas. They are the governing boards of the two principal State supported schools. One of the questions on that agenda of that meeting was the consideration of the responsibility of these two schools for providing a comprehensive plan of higher education for members of the Negro race in Texas.

Q. Did that Board meeting discuss the very wide publicity, including the paper in your home town, the Dallas Morning News, concerning a meeting of Negroes who were [fol 84] insisting on their equal right to an education?

A. When was that? What meeting do you have reference to?

Q. The meting held in Dallas at the Y. M. C. A.

A. What date? Do you mean, held on the 8th of March of this year?

Q. No, prior to January of 1946.

A. I do not—that meeting was not considered at all, and it was not in any way the occasion for our holding the joint session, or discussing that program. We knew, of course,—what we knew was this, that we have approximately 1,200,000 members of the Negro race in Texas. There has been a very great change in the economic situation, and in the educational opportunities or ambitions in the last 15 or 20 years of the Negro race. Members of those two boards felt as officers and directors of the State's leading educational institutions that they owed it as a public duty to devise some means of providing for what they thought was a real need for members of the Negro race, and they implemented that by appointing a committee of six, three from each school, to make a study of that. That committee worked diligently for about six months, made its report to the Governor of Texas, the Hon. Coke R. Stevenson, who in turn appointed the Bi-racial Committee, with which I am sure you are familiar. It filed its report, and that report was the basis of Senate Bill 140. So that the undertaking of [fol. 85] those two boards ante-dated the filing of the suit by the relator here, and was not actuated by any extent by

the meeting, whatever meeting it was, one that I never heard of, in Dallas, though I live there.

Q. Judge, how old is the University of Texas?

A. We think of it as having started in 1883.

Q. Is it not true it is one of the finest schools in the country?

A. It continues to try to be.

Q. About how long do you think it would take to build for Negroes a university equal to that?

A. It would depend to a greater extent on the response of the members of the Negro race than anything else.

Q. Isn't it true that when you set up new departments at the University of Texas, you start off with a few students and end up with a lot when they find out it is running?

A. It depends on the course you set up.

Q. And it depends on the value of the course you have to the students?

A. Will you repeat that, please?

Q. When you first offer or open up a new course in the University of Texas, you usually have a small number of students, and year by year the course usually gets more students?

A. Normally that would be true. It varies with reference to the course and the public interest in the course. It can happen, and sometimes does happen, that what might be [fol. 86] called a flash interest in some subject, and there may be a very great registration, and they will find it wasn't what they wanted and it decreases, but ordinarily this is true in the University and every other educational institution, that it grows as the worth of the instruction is demonstrated. I think you may conclude that is true.

Q. Judge Woodward, the other point I wanted to ask is that you are familiar, are you not, with the supposed law school in Houston, Texas, for Negroes?

A. What do you have reference to, the Texas State University?

Q. No, sir, the one that was, according to the minute entry, was established in February?

A. You mean the one that was provided for by the Act of the 49th, Senate Bill 228, they referred to?

Q. Isn't it true that they did set up facilities for Negro training in law in Houston?

A. I couldn't say because I had nothing whatever to do with it.

Q. Isn't it true that this law school you are about to set up can't possibly run more than a year?

A. No, sir.

Q. What happens to it at the end of the year?

A. Well, at the end of the year from now, on the 13th of next March, if the relator or any other good-faith student comes along, it will be operated.

Q. Isn't it true that under the statute and resolution, it is [fol. 87] supposed to be turned over within a year——

A. No, it can run through August 31, 1948, and if you will permit me to tell you, I will say that the Board of Directors of Texas State University for Negroes at its first meeting passed a resolution——

Q. I will have to object to that. The resolution is the best evidence.

A. We will get it, if you want it. Under the provisions of the statute which permits us to operate until August 31, 1948, and by arrangement with the Texas State University for Negroes, the Law School will be in operation a year from now if there are any students, if the relator or anybody else offers to use those facilities. You have reference to the clause in there, I am sure, if I remember it correctly, directing that at the end of any term we be required to turn it over, if they are ready for it.

Q. At the end of the first term?

A. What clause do you have reference to?

Q. I think it is this one, at the end of the first term.

A. May I read it? (Reading) "At the end of the first term or semester of any law course offered in said school after the organization and establishment of the Texas State University for Negroes at Houston, and the equivalent organization and establishment of a law course by such University for Negroes, the direction, conduct, operation, loca- [fol. 88] tion, the unexpended balance of this appropriation, and all property purchased for the separate school out of the appropriation hereunder, shall be transferred to the Texas State University for Negroes at Houston, and its Board of Directors shall thenceforth continue such law courses as a part of the curriculum of such university, and discharge all responsibility therefor." Was that the clause you had it mind?

Q. Yes. Do you intend to keep the law school here or move it to Houston?

A. At the present time we intend to keep it here until August 31, 1948.

Q. Does it go then?

A. It is assumed that by that time the Texas State University for Negroes at Houston will have established the equivalent work, and the establishment of a law course by such University for Negroes at Houston. In other words, it is contemplated that by the expiration of, roughly, an 18 months period from this date the University at Houston will have had an opportunity to fully equip itself as a law school, meeting all of the requirements of a first class law school, and our duties will be over.

Q. What assurance would Sweatt have that the law school would be here until he finished it three years from now?

A. Until he finishes three years from now? There is no assurance that it would be here three years, nor has he or [fol. 89] any other citizen of the State of Texas the right to require the State of Texas to provide education at any particular place. The State has to provide for him or any other citizen education in law fully equal to that provided at the University of Texas. That, it is prepared to do.

Q. Do you consider it a good educational policy for students to have to shift from town to town in going through a law course?

A. I think my opinion on that wouldn't be very enlightening to the Court. I don't think it is contemplated at all by the facts in the case.

Q. Do the students of the University of Texas have to go from city to city, or isn't it true that since 1907 the school has been situated in the same spot?

A. The Law School has been in Austin for a great deal longer than that. However, we maintain a Medical College at Galveston, a part of the University of Texas. Pre-medical training is given here, and the medical training is given at the University branch in Galveston.

Q. How long has it been there?

A. Oh, it ante-dates the opening of the University here. It is many, many years old.

Q. It has been in the one spot a long time?

A. Yes.

Q. What I am trying to get at is whether or not it is not [fol. 90] true that it is poor educational policy for a student

not to know where he is going to get his education the next year?

A. I would say as to that, that would depend on the circumstances of each individual case. I can not think that it would be the least hardship to a citizen of Houston, as the relator styles himself to be, to have to return to Houston in August of 1948 and complete the final year of his course there.

Q. You don't think so?

A. You asked my opinion. I certainly do not.

Q. The question I am trying to get at is, and I want to ask it one more time, if you will permit it. Isn't it a poor educational policy, speaking from educational policy, you have been on the Board of Regents for quite some time, and you are familiar with good educational policies. Isn't it poor educational policy to have a student going to a school when he doesn't know where the school will be the next year?

A. Well, if he hasn't the acumen to find out where it is going to be the next year, he hasn't any business in the school. It couldn't possibly be any matter of inconvenience or uncertainty to a man of ordinary intelligence, where the school will be conducted the following year. He knows now it would be here until August 31, 1948. He knows that.

Q. Judge Woodward, can I ask you one question.

A. Any number.

[fol. 91] Q. Do you know where it will be in 1948?

A. With reasonable certainty, I do, based on the obligations of the State officials to carry out their duties, and upon the presumption that they will carry them out, it will be in Houston, in Harris County, Texas, an integral part of the State University for Negroes, on August 31, 1948.

Q. Depending on the establishment of that University prior to that time?

A. The University is now established.

Q. Where is it established?

A. In Houston, Texas.

Q. And who is the dean of it?

A. You mean the Dean of the Law School?

Q. No, the dean of a university that has been established?

A. I can tell you the members of its governing board. They were appointed last week. If they have selected the officers of the University I haven't been advised of it.

Q. Wasn't that their first meeting last week?

A. It was. They were appointed and confirmed and met the same day.

Q. But the school hasn't been established yet, has it?

A. That is a conclusion. My conclusion is, as a matter of law that the Texas State University for Negroes has now been established.

A. Are there any buildings?

[fol. 92] A. There is another statute which I think has been finally passed which provides for the Texas State University for Negroes acquiring 53 acres of land and the buildings on it as a site for the Texas State University for Negroes. That land is located within the City of Houston, about mid-way between Rice Institute and the Houston University, which is a very large university.

Q. What I am trying to get at——

Mr. Daniel: Let him finish.

By Mr. Marshall:

Q. All right.

A. I have every reason to believe that that building, which is the equivalent of any building on our campus at the University of Texas, modern construction and very adaptable for university purposes, will come into control of the Board of the Texas State University for Negroes within the next few days.

Q. What I am trying to get is,—you said a minute ago that the school was in existence?

A. I said it was established. That is my judgment as a lawyer.

Q. Was established?

A. Yes.

Q. As I understand your testimony, all of this you have testified will happen; is that correct?

A. That is right. That is my best judgment. I am not a prophet. I am informed as to the facts, and that is my de-
[fol. 93] liberate judgment.

Q. Is that your judgment, that the Law School will be in Houston in August, 1948, and that is based on your assumption that this University will be in existence at that time?

A. Based on my knowledge of the whole situation and my knowledge of the laws that provide for that, and my knowledge of the laws which require public officials to do their duty.

Q. How many schools are there set up in this Negro University.

Q. You mean separate schools of instruction?

Q. Like up at the University of Texas? As I understand, it is to be equal.

A. Are you talking about its prospective curriculum?.

Q. What is there now?

A. The Texas State University for Negroes, you want to know how many schools have been set up there now?

Q. Yes, sir.

A. I would say that I think it improbable that any one has been set up.

Q. So that it is at the present time still on paper, is it?

A. Well, if you wish to put it that way. Every step in its organization thus far contemplated by law has been taken, and $2,350,000.00 in money is in the bank to pay for its operation during the next two fiscal years. That is substantial paper.

Q. And, of course, the statute says two million, or what-
[fol. 94] ever it is, or as much thereof as might be needed?

A. That is the customary language in our appropriation bills.

Q. That is the custom. As the Chairman of the Board of Regents of the University of Texas, have you deemed it your responsibility during the whole time you have been on the Board of Regents to give equal educational facilities to all citizens of the State of Texas?

A. My—as far as it is within my power, yes. It happens to be that I actually believe in education, and I think one of the very most forward-looking things the State of Texas could do would be to provide a comprehensive plan of higher education for members of the Negro race.

Q. But prior to this year the University of Texas has done what to provide education for Negroes?

A. Well, you will understand that the University of Texas is governed by the Constitution of the State, and that we have done exactly what the Constitution authorizes us to do in the conduct of the University of Texas, which is the school set up for the education of children of the white race, but we are, rightly or wrongly, the University is regarded as the head of the educational system of Texas, and as Chairman of the Board, I have conceived it to be my duty to do what I could to promote within the provisions of the

law the best of educational facilities for all of the citizens of Texas.

Q. What provision have you made for Negroes prior to 1946?

[fol. 95] A. Prior to 1946. I came on the Board at the end of 1944. The Legislature, the 49th Legislature, met in January following and there was no opportunity under conditions then existing at the University and elsewhere in the State for me to take any part in the deliberations of the 49th Legislature, other than as related immediately to the University of Texas. I attended to that. No member of the University of Texas, so far as I know, and no member of the governing board of officers of A. & M. College was consulted about the passage of Senate Bill 228, as far as I know. That is the Act that undertook to make Prairie View a university.

Q. A university?

A. When I got squared away, when the picture as a whole began to take shape, it was rather obvious to me that Senate Bill 228 had to be materially supplemented, if there was to be created in Texas a comprehensive program of higher education for members of the Negro race, which I thought was highly desirable.

Q. Isn't it true that prior to that time, as a matter of fact, the University of Texas had no facilities of any kind where Negroes were in attendance.

A. It is true today, and it has been true every day since the University of Texas was organized, that it could not lawfully extend the use of its facilities to members of the Negro race. That is a matter of constitutional limitation. [fol. 96] We had nothing to do with bringing it about at this time. It was passed in 1876. That is the reason, if you want a reason, why we haven't done anything of that kind; it is because we are prohibited by law, and naturally we can not conduct a public institution otherwise than in compliance with public law.

Q. You had no hesitancy in having the—first, are the professors of law at the University of Texas white?

A. Yes, sir.

Q. There was no hesitancy in arranging for them to teach Negro students, was there?

A. None at all as a branch of the Texas State University for Negroes. We had a legal right to do that, and I was extremely proud of their cooperation in doing it.

Q. But although the teachers had no objection to teaching Negroes, the Board of Regents couldn't admit the Negroes to the Law School?

A. You understand it perfectly, I am sure. You understand why we can't. We are bound—as good a lawyer as you are, you are bound to know that we operate under the Constitution of the State of Texas. Your associate here knows it.

Q. Is it not true, since we want to get straight what the two of us know about it, that the Constitution of Texas is, of course, dependent as to its validity on the interpretation of the Constitution of the United States? We agree on that, [fol. 97] don't we?

A. Absolutely, yes.

Q. All right. When compared with the advantages offered the students of law at Texas University, is there any measure of equality in a set-up which forces a Negro to begin a law course which will be shifted to another institution, the professorship has not been selected, the quality and quantity of instruction, of which is not at the present time known?

A. What is your question? Is there any measure of equality?

Q. Yes, sir.

A. Well, if the relator was in school it would be a little easier to answer that. I will say this, that where the policy of the State of Texas has been established by the adoption of a statute by more than two-thirds of the vote of both branches of the Legislature, with liberal appropriation made for its support, that there is no discrimination whatever, and no uncertainty, against a student who undertakes to avail himself of instruction in the law under the provisions of that statute. I don't think he is discriminated against in the least. I know as a practical matter that the opportunities which would have been afforded the relator, had he seen fit to enter the Law School, the opportunities for instruction in law in the school we set up on East 13th Street [fol. 98] would have been fully equal to that had he been permitted to enter the University of Texas. That may or may not answer your question.

Q. That doesn't answer the question.

A. I would be glad to make another try at it.

Q. The question in sum and substance is, working on this theory of equal facilities, separate but equal, do you consider

it equal for a Negro student to go to a school, knowing full-well that on next year he doesn't know where his school will be, who the professors will be, or anything about the school? Is that equal to the Law School that was established at the beginning of the century.

A. Under the conditions existing, it affords him fully equal opportunity. You have not stated the question correctly, so that I will have to qualify it by "under the conditions existing." You have failed to state in your question that the Law School is established by the University of Texas, now established on 13th Street for the period ending August 31, 1948. You have forgotten to state that Senate Bill 140 provides for the establishment of this university, not at any uncertain place, but at Houston in Harris County, Texas, and directs that it be conducted as a University of the first class in Houston. Those are the qualifications; my knowledge of the facts which may control my judgment in the case, my knowledge of the class of instructors he would [fol. 99] have here, and the opportunity he would have if he would avail himself of it, leads me to say that he is under no discrimination, if he availed himself of the training the State of Texas had made available for his legal education.

Q. He spends two or three hours a day in class?

A. I wouldn't know.

Q. What do you use as a basis for your statement?

A. I went to the University of Chicago Law School when it was small, and had the benefit of association with men like Mr. Meachem, and Mr. Hall and Mr. Bigelow, and relations with them which a man going there today as a member of a class of five or six hundred would not have. That is the reason that I know that the relator or any other members of his race, if they came to that school which we have established on 13th Street and in good faith undertook to complete their legal education, they would receive instruction and conferences and experiences which they would not have anywhere else today. I know that, because I know the men who would be teaching. Those men are men who have devoted their lives to teaching. They are all full time professors in the Law School.

Q. Which ones are you talking about now?

A. Because they would come down there,—I am talking about all of the members of the faculty of the University of Texas.

Q. All of them?

[fol. 100] A. We haven't, as far as I know, unless it be an emergency matter, have none other than full time instructors.

Q. Do you consider it necessary to have full time instructors?

A. Well, I think it is desirable to have them, where you have an institution that can employ them all of the time. There are certain fields in which part time instructors are desirable, just as in my University of Chicago days we had Julian W. Mack, whom you will remember was the Professor of Federal Procedure, Horace Kent Penney, who was a great lawyer and Professor of Pleading and Practice.

Q. Isn't it generally accepted that law schools should have full time professors?

A. I believe that is the current view, and I think it is a sound one. That is the reason that we provide here that the full time professors from the University of Texas should be made available here.

Q. They can't be full time at both places, can they?

A. We feel we can't be prejudiced by having them full time on 13th Street, and give them up at the University of Texas.

Q. They are all part time at the 13th Street law school?

A. It isn't a question of part time, in the sense that they are people engaged in the practice. They are, every one of them, State employees, engaged for their full time in the instruction in the science of law. The fact that they spend part of their time in one institution and part in another [fol. 101] doesn't make them part time, in the sense that a practicing lawyer would be. At the time I foolishly undertook to part time lecture in the law school it didn't work out for me or the law school, because I was a part time man, and that wasn't good, but if I had been able to be a professor in the Law School at the University, and spent part of my time on 13th Street, I would be none the less a full time employee.

Q. I am talking about part time law professors within the meaning of the standards of the American Association of Law Schools.

A. How do you define it?

Q. A teacher that isn't in the school full time.

A. In that specific school. I wouldn't say that made

any material difference, if he was in fact a trained professor and was in a school as much as the—as was required for the number of students who were there.

Q. Isn't it true that the reason for full time professors is to have someone available at all times of the day, whenever the students want to see them?

A. I really wouldn't know whether that is the reason for it.

Q. And the Dean of the school, Dean McCormick of the University of Texas, who will be at this school part time?

A. Whenever he was needed he would be there.

Q. Where would his office be?

A. At the University of Texas, except when he came down [fol. 102] there. There would be space there when he had occasion to confer with anybody down there.

Q. Could these students go to see him at the University of Texas?

A. Without doubt. If they had occasion to, I imagine Dean McCormick would not object to conferring with a student anywhere.

Q. I am reading to you from Senate Bill 140, sir, the section of the statute which says:

> "The entire school shall be operated separately and apart from the campus of the University of Texas."

A. That is right.

Q. You say that despite that provision?

A. Yes, sir, certainly. With the school operating there, the fact that a student may see Dean McCormick in this court room or on the street or in his office at the University of Texas wouldn't militate against the operation of the school apart from the campus of the University of Texas.

Q. So that if a student at the University of Texas wants to see him at the University he walks across the hall and there he is?

A. Yes, sir, in accordance with the hours of appointments.

Q. And the 13th Street student would have to go eight blocks?

A. Yes. It looks like to me you are magnifying things [fol. 103] that any student in good faith in attempting to get an education would not consider a hardship at all.

Q. I am basing mine on, not on what I think students

do. I am basing mine on the rules of the Association of American Law Schools.

A. It looks like you are magnifying things of little moment compared to the scheme as a whole.

Q. I am not obliged to argue with you at this time. The final thing I want to get is that you are not familiar with the standards of the American Association of Law Schools.

A. Not other than in a casual way.

Q Can you name any of them?

A. Not without reference to them, I wouldn't undertake it.

Q. You are not familiar with the standards of accreditation of the American Bar Association, are you?

A. Only in a general way.

Q. So that all of your testimony is based on your own personal observations and your own personal beliefs, is that correct?

A. It is based on my personal knowledge of the relevant facts over many, many years, over my experience—on my experience as a student in the University in its academic department and in the Law School of the University of Chicago, and upon the general information that I naturally have to acquire in the discharge of my duties.

Q. Your primary livelihood is practicing law?

[fol. 104.] A. That happens not to be the fact.

Q. It isn't legal education, is it? That isn't your field?

A. The position I occupy, of course, carries with it no compensation whatever. It is—I serve as a matter of public service without compensation at all, and naturally what information I acquire about educational matters comes merely from the discharge of my public duties, and not at all as a paid agent, or function of the State.

Q. Do you consider a school that is unapproved by either the Association of American Law Schools or the A. B. A. as equal to a school that is approved by both of them?

A. That, again, would depend on the circumstances under which the school was operated. You apparently are trying to draw a comparison between the provisions which the State of Texas has made upon the occasion of the first application ever made to it by a member of the Negro race for education in law. Now, we have laws on our books that have been here for a great many years, within the terms of which we must operate, and do operate. The advisors

of the State of Texas have set up a plan here, which, when carried out according to the provisions of the statute, which it must be presumed will be complied with, will entitle this law school to accreditation anywhere.

Q. Judge Woodward——

A. So that there is in my mind not the least discrimina- [fol. 105] tion involved in providing the type of education which we have provided, as compared to that which is provided at the University of Texas, no discrimination. I don't think that a student studying law here and graduating from this school that we have set up would be prejudiced at all by reason of the fact that the school in its initial stages had not been accredited by these organizations.

Q. Are you familiar with the fact that in some states you can not take the bar unless you came from an accredited school?

A. No.

Q. Would you consider that a handicap?

A. The only handicap——

Mr. Daniel: We object to that question as to other states. He has alleged only that he wishes to prepare himself to practice here.

The Court: I think he has answered the question, anyway.

By Mr. Marshall:

Q. The last question I asked, I am limiting him to the present time, not the future, as of March 10, or as of today.

A. Which time, now?

Q. Take March 10th.

A. All right.

Q. With the facilities in the 13th Street school available there, and without considering the books that are on order [fol. 106] that are not there, do you say that that furnishes facilities equal to the facilities offered all other students at the University of Texas Law School?

A. An answer to that question would be wholly without value, because it would not take into consideration the facts as they existed at that time.

Q. I am talking about everything that was in that school at that time?

A. I will say this. I will answer your question this way, that the provisions which you relate, plus those definitely

and certainly available, provided for the relator, if he had applied, facilities fully equal to those then provided at the University of Texas Law School.

Mr. Marshall: If Your Honor pleases, I hate to insist on this, but I think the question is material and we are entitled to an answer to the question alone.

The Court: Wasn't the last part an answer to it?

Mr. Marshall: No, he said taking that into consideration.

The Court: That may be the best he can answer it. I don't know.

Mr. Marshall: He has testified all along, if Your Honor please, that this set-up furnishes equal facilities. I think I have a right to test him as to what he means by it.

The Court: You can ask him.

[fol. 107] Mr. Marshall: And I want to find out what is in this law school they are talking about. I am not interested in what is outside. We have gone into that. I am talking about what is in existence.

The Court: Perhaps you can limit it to the first of March.

Mr. Marshall: The 10th, sir.

Q. Judge Woodward, the question is that on March 10th, as to that date, which is the date the school was to open, considering all of the facilities that are available, in existence in the law school building at 13th Street, do you say that that furnishes educational facilities equal to the facilities offered at the University of Texas to all other students?

A. Beyond any question, it does. I will call your attention to that——

Mr. Marshall: If Your Honor please——

The Court: He has answered it.

Mr. Daniel: I believe he has a right to explain his answer.

The Court: He can. He has answered it, however.

A. My answer is, beyond any question, it does.

By Mr. Marshall:

Q. Go ahead.

A. I wanted to tell you why I am so firmly of that opinion. The third from the last paragraph of the resolution of the Board of Regents of the University, then in effect, reads as [fol. 108] follows:

"Be it further resolved that pending receipt and installation of such library the Dean of the Law School

of the University of Texas be, and he is hereby authorized to supply on a loan basis books from the law library of the University of Texas which may be needed in the efficient conduct of the School of Law of the Texas State University for Negroes."

That provision, together with the library of the State of Texas within 100 yards of that school would meet the most exacting of requirements of any good faith student in the University.

Q. My question was, was it equal?

A. Yes, sir, fully equal.

Q. Do you mean equal, or do you mean if you use both of them you can get the same thing? Isn't that what you really mean?

A. I mean this, that the educational opportunity offered relator by those facilities at that date was fully equal to those offered on the same day in the Law School of the University of Texas eight blocks away. That is exactly what I mean, because that is a fact.

Q. Do you know the curriculum of the law school of the University of Texas?

[fol. 109] A. In a general way. It is identical in both schools.

Q. Do they have the Law Club set up in this school?

A. A Law Club is set up by the students. Perhaps if the relator came and other representatives of his race came, you could form one.

Q. You can't form it with one student, and you can't have moot court with one student, can you?

A. No, you couldn't do it.

Q. And you couldn't have any of the interchange common in law schools with one student?

A. I presume if there is a good faith desire on the part of the Negro youth of the State of Texas to attend law school, all of those facilities will be developed in a short time, just as I presume they are at Lincoln and Howard. You have to start somewhere.

Q. While this is going on it is true, is it not, that the students are not getting the same things they are getting at the University of Texas? Isn't that true?

A. Are you talking about social contacts, or educational?

Q. Sweatt isn't interested in social contact. He is interested in getting the best legal education he can get.

A. Why didn't he come on the 10th of March?

Q. Your lawyers will have the opportunity to ask Sweatt about that.

A. If that is his only interest he is sitting there within [fol. 110] one hundred yards of the Supreme Court of Texas, the Court of Civil Appeals, and the Attorney General's Office, and the Legislature, where the public legal business of the State of Texas is centered. He has an opportunity unsurpassed to acquaint himself with those facts.

Q. He is in the middle of everything but the Law School of the University of Texas?

A. He is in the middle of the Law School provided by law for him.

Q. That is right, but I mean the University of Texas. The other question is as of today. Is there any material change in the existing facilities in being in the 13th Street school of law from what it was on March 10th?

A. Compared to March 10th?

Q. Yes, sir.

A. None that I observe.

Q. Practically the same, is it not?

A. As far as I know. That is the way it appeared to me when I was over there the other day, practically the same.

Q. That is all.

(Court was recessed at 10:45 a. m., May 13, 1947, until 11:00 a. m., May 13, 1947, at which time proceedings were resumed as follows:)

Redirect examination.

Questions by Mr. Daniel:

Q. Counsel for relator has gone into the establishment or [fol. 111] future establishment of the Texas State University for negroes in Houston, and you stated that 53 acres of land were available there between Rice Institute and the University of Houston, in the City of Houston, for this University: I will ask you, have you inspected that 53 acres of land?

A. I have.

Q. Is that the tract of land on which the buildings are located that you have testified the State University for Negroes has available?

A. Yes, that is the tract on the west end of which this new modern building has been completed.

Q. Are there any other buildings on that tract of land already?

A. Not of a permanent nature. There is one planned, and there was some preliminary work going on when I was there 60 days ago.

Q. Is a college or university being operated there now?

A. I don't know whether they are occupying the new building or not. It was just being completed. It was almost ready for occupancy when I was there, a beautiful building.

Q. What is the name of the school that has that 53 acres of land at this time?

A. It is called Houston College. It is a branch of the University of Houston, which, in turn, is a body corporate and politic created by the Legislature and operating within the Houston Independent School District.

[fol. 112] Q. Is it operated as a branch of the University of Houston?

A. The Houston College?

Q. Yes.

A. Such is my information, yes, sir.

Q. What is the approximate enrollment?

A. 1,800, as I now recall.

Q. Now, is that the school, the campus and so forth, that you have testified about that has been made available for transfer to the Texas State University for Negroes?

A. That is my interpretation of the statute which has been passed.

Q. The statute that you refer to is House Bill 780, is it not?

A. I couldn't recall the number, General.

Q. I will ask you to look over House Bill 780 and see if that is the act of the Legislature to which you refer.

A. The caption indicates that it is the statute. I can examine the whole bill if you like, but I am quite certain from examining the caption that it is the bill to which I have referred.

Q. I just simply call attention of the Court to House Bill No. 780 which has been enacted, which provides for transfer of such facilities as have been testified about to the Texas State University for Negroes by any school district within

which said facilities are set up. Now, I will ask you, do you of your own knowledge know whether or not the University [fol. 113] of Houston Board has proposed to donate this property and the entire school to the Texas State University for Negroes?

Mr. Marshall: We object to it. In the first place, the minutes would be the best evidence, and second, there is no duty for him to have received that at all.

The Court: Of course, the resolution would be the best evidence.

Mr. Marshall: Yes, sir.

Mr. Daniel: By agreement we will offer this plat as the next exhibit.

(Said instrument was admitted in evidence as Respondents' Exhibit No. 4.)

Q. Referring to that plat which has been introduced in evidence as respondents Exhibit No. 4, showing the floor space in that first floor of the building which you now have leased, I will ask you now to state to the Court how the second floor of that building which you say you have arranged for, for the State, will compare with the amount of space on the first floor?

A. It will be equal to it.

Q. The arrangement of the rooms and number of rooms?

A. Substantially the same.

Q. Now, will you answer the same question with reference to the third floor of the building; how much space, and the arrangement, as compared with the first floor?

[fol. 114] A. Substantially the same on each floor.

Q. How many rooms on the fourth floor?

A. My recollection is that that is a large room there. I don't recall the partitions in it, but substantially the same floor space.

Q. Substantially the same floor space?

A. Yes, sir.

Q. Now, counsel for relator has asked you the question of whether or not this school as it now stands will meet the American Association of Law School standards and requirements. I will ask you whether or not you have plans if sufficient students enroll, to operate that school in such a way that it will meet those standards and requirements at the very earliest possible date?

A. We have.

Q. Do you have—have you considered whether or not your appropriation of a hundred thousand dollars is sufficient to meet those standards, or as many of them as can be met with students between now and September 1, 1948?

A. We have.

Q. Have you itemized the necessary expenses to meet those standards between now and September 1, 1948, provided you had students?

A. We have, as far as we could predict the use of the facilities.

Q. Do you have your estimated cost of operating such a school?

[fol. 115] A. I have.

Q. Does your estimated cost for the operation of such a school provide for full time professors?

A. Yes, sir.

Mr. Marshall: If Your Honor please, may we find out what the witness is reading from?

A. I will hand it to you, if you like; a proposed budget which I requested my associates to help me prepare for the operation of the school through August 31, 1948, assuming that the relator and other qualified students apply for admission.

Mr. Marshall: May we ask a preliminary question for an objection?

The Court: Yes.

Mr. Marshall: Did you prepare it?

A. I helped prepare it.

Mr. Marshall: Are these your figures or somebody else's?

A. Part mine, and somebody else's also.

Mr. Marshall: Partly somebody else's?

A. You understand that in an organization such as I represent it is rare that one man does all of the thing. That budget has been prepared by Dean McCormick and myself, as we prepared many other budgets of a similar nature in the operation of the University. You understand the academic matters are provided by the men skilled in that, and [fol. 116] the administrative matters by those skilled in that, and the cooperation results.

Mr. Marshall: It is part yours and part somebody else's.

A. Part both. I am familiar with the matters outlined here.

Mr. Durham: I want to ask a preliminary question. You prepared those figures, in part, in what capacity?

A. In what capacity?

Mr. Durham: Yes, in what capacity?

A. In my capacity as Chairman of the Board of Regents of the University, and carrying out the duties imposed by that resolution.

Mr. Durham: Have those figures been approved by the Board as a whole?

A. The Board of Regents?

Mr. Durham: Yes.

A. No.

Mr. Durham: We object to it as not being official.

The Court: I think he has not offered them. He is simply using it to question him from.

Mr. Durham: If they are not admissible in evidence I don't think they are admissible to use them as a memoranda.

Mr. Daniel: You haven't given me a chance to prove them up yet.

Mr. Durham: We object, until you do prove them up.

[fol. 117] By Mr. Daniel:

Q. As I understand, what you have is an estimated budget through August 31, 1948 of what amounts it would take to meet the requirements of the American Association of Law Schools, as far as they can be met within that period of time?

A. That is right.

Q. And you have prepared that for the purpose of determining whether or not you have sufficient money to meet such requirements?

A. Yes.

Q. How much do you take into consideration for rent that will be required for rent on the building until August 31, 1948?

Mr. Durham: Your Honor, we want to make this objection; that that isn't an official act of the Board of Regents. It is an individual opinion of two members of the Board

of Regents, and would not be binding on the Board of Regents. It is wholly inadmissible and speculative.

The Court: If he knows what the rental is, I think he could testify.

Mr. Durham: I think so, too, but not what the Board of Regents estimate.

Mr. Daniel: I would like to call the Court's attention to the fact that the Board gave, in this resolution, the Chairman, all of the powers to go ahead with this plan.

Q. How much have you allowed in this estimate for rent on the building?

A. On the portion of it now occupied $1,875.00. That [fol. 118] is the contract rental of $125.00 a month. We have estimated it would require $3,000.00 to acquire the additional floors, in the event they are needed, and negotiations that I have made under authority of the Board are carried out. You understand this is just an estimate.

Q. I understand.

A. Made in the usual course of the discharge of my duties.

Q. Have you allowed anything in your estimate for repairs and improvements?

A. We thought $2,000.00 would be reasonably needed to make provision for rearranging the space to take care of the library, and we hope for students who might come.

Q. Do you know how much of that has been spent?

A. I don't know. Some considerable sum, but the Comptroller could tell you that.

Q. How much have you allowed for the books you have testified about having ordered?

A. $32,000.00 was estimated to be the cost of those volumes.

Q. Do you have any allowance in your estimate there for library upkeep?

A. $2,000.00, we thought would cover that.

Q. What estimate have you made as to salaries?

A. We have in there four professors at $6,000.00 per annum, which is the base pay for professors of law in the University, and figuring the time they would be employed, [fol. 119] that is on a nine months basis, we estimated it would take $30,000.00 to employ them, if we are fortunate enough to secure students.

Q. Have you made any allowance for summer school this year?

A. Yes, four full time professors at $2,000.00 for the summer term each, which is the amount we would pay the same men at the University.

Q. When does the summer semester begin at the University?

A. Right around the first of June; I would have to look at the calendar to see. I would say around June 3d, I think.

Q. Will the new law school be ready to open another semester around the first of June?

A. Yes.

Q. Have you allowed anything for a full time librarian?

A. Yes, sir, $4,500.00. That is at the rate of $3,600.00 per annum.

Q. Have you allowed anything for other employees?

A. Well, custodian and janitor, $100.00 a month, $1,600.00. Secretary, at $1,800.00 a year, $2,250.00; stationery and supplies, $300.00; contingent and miscellaneous expense, $1,000.00. Those figures total $88,725.00, and leave an unexpended balance of $11,275.00, from the appropriation of $100,000.00 which is today available.

Q. The attorney for relator asked you about the time that would be given by University of Texas professors in the [fol. 120] new law school before you have full time professors employed there for the new law school. I will ask you, what is your opinion if—the same kind of question he asked you—as to the amount of time that could be given to the students in the new school individually as compared with the amount of time the same professors could give to the same students if allowed to attend the University of Texas Law School.

Mr. Durham: We object to that for the reason this is one of the officials. We are not to assume that he knows his duty. I think he is entitled to testify what time was required. This is not a witness who is presumed to state what his duties are upon presumption. He knows his duties.

The Court: If he knows that,—what time they could give to it, it would be all right. I just don't know.

A. I am not entirely certain that I understood the question. If you are asking me to approximate it as a matter of hours per student per instructor, is that what you have in mind?

By Mr. Daniel:

Q. No, what I had in mind; following up the point that counsel made as to the fact that your professors from the University of Texas would be in the new law school part time, I am asking you whether or not, if you know, they would be able to give the students in the new law school as much of their total time as they would give if the students were out at the University of Texas taking law under them in those classes out there.

[fol. 121] A. They would be required to give——

Mr. Durham: We object to that as being a presumption. We have no objection to what the professors were hired to do, but his opinion as to what they could do would be a presumption and conclusion. If they hired the professors the contract of employment is the best evidence of the terms of it, whether it is verbal or written.

The Court: I think perhaps, counsel, he is asking the opinions. You can have your bill.

Mr. Durham: Note our exception.

A. They are required, whenever the relator or any other student offers himself, to give to him all of the time and attention necessary to carry the provisions of that resolution into effect.

The Court: I believe that isn't an answer to your question.

Mr. Daniel: I withdraw the question for the time being.

Mr. Durham: We ask that that answer be stricken.

The Court: Yes, sir.

By Mr. Daniel:

Q. Do you know how many applicants, or inquiries you had about the school prior to March 8, 1947?

A. Only by report. I didn't receive them personally. I know from the records, and the reports at the University.

Q. Do you know that there were some inquiries for registration?

[fol. 122] A. There were.

Q. Do you know of any meetings held by an organization of the Negro race and attended by any persons in this court room on March 8, 1947, in Dallas?

A. Through public reports.

Mr. Durham: If Your Honor please, may we have that stricken?

The Court: Only of his knowledge.

By Mr. Daniel:

Q. Do you know of your own knowledge?

A. Only through public reports and conversation.

Mr. Durham: We object to that as not being responsive and hearsay.

Mr. Daniel: That is all.

Recross-examination.

Questions by Mr. Marshall:

Q. Judge Woodward, 53 acres, you say, are available in Houston. Is that not at the present time the property of this, the Houston Junior College, a Negro school now in existence?

A. It is known as the Houston College Branch of the University of Houston; and it is the identical property contemplated by this statute that was read here.

Q. Is it not true that that property is property that was purchased for the most part from private donations, including donations of Negroes?

A. There were substantial donations, I know, according [fol. 123] to the press reports, by members of both races, in part. I don't know whether that was so wholly. The title to it is vested in the body corporate, politic—it is known as the University of Houston.

Q. What arrangement in salaries was made with the professors at the 13th Street law school?

A. They would draw the same salary as they draw at the University of Texas.

Q. Was that part of their salary to be paid out of this $100,000.00?

A. Yes, for the services rendered at the law school, they would be paid.

Q. I understood you, when you were going through this proposed budget, they were going to pay them the same they were paid at the University of Texas Law School?

A. Yes.

Q. But they didn't get two salaries; the proposal wasn't to give them two salaries?

A. No, what we are hoping, in making up the budget, hoping very much that—these are outside figures based on the hope that the relator and other students of the Negro race qualify, and in sufficient numbers to permit us to conduct a law school, come in, and happily give us the opportunity to employ four full time professors.

Q. Do you mean you need a certain number before you can [fol. 124] run a law school?

A. Naturally, you would one kind of arrangement for one kind of student body, and another arrangement for another student body.

Q. Wouldn't the library be the same, with the exception of duplicate volumes, whether you had one or one hundred students?

A. The library has already been provided, adequate for any number of students who might reasonably be expected to apply, and it will be completely available.

Q. You testified under examination by the Attorney General that that budget was prepared in order to meet the standards of the American Association of Law Schools?

A. I testified it was prepared to enable the school of law of this State University—the Texas State University for negroes—to comply with those standards under any reasonable set of circumstances that might arise. These are outside figures, or expenditures which the State of Texas has provided for. We can spend only so much of that as the circumstances, as they arise, may require.

Q. Who was the full time librarian?

A. We will appoint a full time librarian when the relator or some other qualified students apply for instruction there.

Q. Did you have a full time librarian when the school opened March 10th?

[fol. 125] A. No, we didn't have any students, either.

Q. Did you have any at that time at the University of Texas Law School?

A. Yes.

Q. You do, do you not?

A. Certainly.

Q. And you have assistant librarians, too, don't you?

A. Where we need them, yes.

Q. That is all.

Redirect examination.

Questions by Mr. Daniel:

Q. Mr. Woodward, from your experience as Chairman of the Board, and on the law faculty, I will ask you your opinion, that if there were as many as 14 inquiries for this law school before March 8, 1947, would you, in your opinion, expect in the normal course of school operations that there would be at least some students report for admission on March 10th, if something had not happened to keep them from doing so?

Mr. Durham: Your Honor, we object to that.
The Court: I think it is rather speculative.
Mr. Daniel: That is all.

(Witness excused.)

[fol. 126] CHARLES T. MCCORMICK, a witness produced by the Respondents, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Daniel:

Q. State your name, please, sir.
A. Charles T. McCormick.
Q. Where do you live, Dean McCormick?
A. I live in Austin.
Q. What position do you hold with the University of Texas Law School?
A. I am the Dean of the school.
Q. How long have you been Dean of the Texas University Law School?
A. Seven years.
Q. Prior to that time what experience had you had in law school work?
A. Well, I became a professor of law at the University of Texas in 1922. From there, in 1925, after serving during the intervening period, I went to the University of North Carolina Law School as Dean of the Law School; and in 1930 I went to Northwestern University Law School as professor of law, and served there until 1940, when I returned to the University of Texas Law School as Dean.

[fol. 127] Q. What degrees do you hold, Dean McCormick?

A. The A. B. Degree from the University of Texas, and L.L.B. Degree from Harvard Law School.

Q. Are you one of the authors of McCormick and Ray on Evidence?

A. Yes, sir.

Q. Would you state to the Court what, if any positions, you have held in the American Association of Law Schools?

A. I have served as a member of the Executive Committee, and as President of the Association.

Q. When were you President of the Association of American Law Schools?

A. In 1942.

Q. On what groups within the Association have you served?

A. Well, I have served on the Executive Committee, as I mentioned, and upon various committees, such as the Committee on Cooperation of the Bench and Bar, and several other committees, the entire list of which I do not remember.

Q. Are you familiar with the terms of Senate Bill 140 that has been reviewed here to the Court this morning?

A. Reasonably so.

Q. Are you familiar with the terms of the resolution of the University of Texas Board of Regents, dated February 28, which was read in evidence this morning?

A. Yes, sir.

Q. I will ask you if under that resolution you assumed the [fol. 128] position of Dean of the Law School for the State University for Negroes?

A. Yes, sir.

Q. Did you under the provisions of that resolution and the instructions of the Chairman of the Board of Regents establish, or help establish, such new law school?

A. Yes, sir.

Q. Are you acquainted with the physical facilities of the Law School for the State University for Negroes?

A. Yes, I am.

Q. How many class rooms do you have at the University of Texas?

A. We have three class rooms.

Q. How many students do you have at the University of Texas Law School? Of course, I am talking about——

A. Approximately 850 at this time.

Q. How many class rooms do you have in the law school for Negroes?

A. Well, there are two class rooms.

Q. How do the physical facilities of the new law school compare with the University of Texas Law School, as far as lighting, ventilation and other such matters are concerned?

A. Well, I would say they were approximately the same, or similar.

Q. About how many inquiries or applications did you receive for admittance in the new Negro law school?

[fol. 129] A. Personally, I believe by letter or in person, I received five inquiries, but the inquiries would normally come either to me or to the Dean of Admissions, and the Registrar, Dean Matthews, of the University, and he received some of the inquiries.

Q. He received others, did he?

A. Yes, he so informs me.

Q. About what maximum load did you figure for students for the first year in the new law school, based upon the maximum load,—based on inquiries received?

A. Well, I hoped and expected there would be at least five or six at the beginning of the school, and that as the years went on and subsequent terms were opened, that perhaps ten or twelve would register. I say that in the light of the Negro population of the State, and my observation of some similar schools that have been established for Negroes in other states.

Q. Based upon the maximum load that you could reasonably expect for the first year of the school there, and compared with the maximum load of students at the University of Texas Law School, I will ask you to compare the physical facilities offered by the Negro Law School with those offered at the University of Texas Law School.

A. Well, with respect to the adaptability for use, for the expected number, the ones who would attend the Negro Law [fol. 130] School, as compared with the actual conditions of attendance at the University of Texas Law School, why, I would say that the physical facilities were roomier and more convenient than those at the University of Texas Law School.

Q. You mean the facilities——

A. Floor space per student would be substantially greater if an estimate of 10 students were made.

Q. Do you have the figures on floor space per student at the University of Texas Law School at the present time?

A. Yes, I do. These figures were furnished me by the Comptroller, and from my observation of the situation, I would say they were correct.

Q. Approximately how many square feet of floor space do you have at the University of Texas Law School?

A. We have 46,518 square feet.

Q. How many students do you have at the University of Texas Law School?

A. Well, there were 886 at the beginning of the year.

Q. Have you figured the approximate number of square feet of floor space there at the University of Texas?

A. Well, the figures as made by the Comptroller are 53 square feet per student. I haven't actually divided that number into the other. I assume that is correct.

Q. Approximately 53 square feet. Have you examined this floor plan of present space available in the new law school?

[fol. 131] A. Yes, I have.

Q. Approximately how many square feet of floor space are available there, total?

A. That, again, is a measurement by someone else, but it accords with my general observation; and it is reported to me as 1,060 square feet.

Q. Have you examined the space?

A. Yes.

Q. Does that appear approximately correct to you?

A. It does.

Q. Based on a maximum load of ten students, then, that would give you how many square feet per student in the new law school?

A. 106.

Q. 106 square feet?

A. Yes.

Q. Does that take into consideration any of the library space available in the State Capitol Building, the figures that you have given?

A. No, it does not.

Q. Now, on that basis of comparison, I will ask you to state whether or not in your opinion the physical facilities offered by the Negro Law School are substantially equal to those offered at the University of Texas Law School?

A. Yes, having in mind, as I said before, the respective [fol. 132] use by the respective number of students in each of the two institutions.

Q. Do you know about how many students were contemplated, or how many were figured in the needs for the University of Texas Law School Building, how many students it was built for, whether or not you are crowded or not?

A. Well, it was planned for four hundred students. It now has, as I said before, about 850.

Q. It now has about twice as many as the building was actually built for?

A. Yes, sir.

Q. Now, as to library facilities in the new school, are you acquainted with the Texas State Library over at the Supreme Court Library on the second floor of the Capitol Building?

A. Only in the most general way. I have visited it and looked at it.

Q. Are you acquainted with the space and the desks and the places available for study?

A. I have such acquaintance as you would get from casual observation.

Q. Would such facilities there in the library offer as much room as the Texas University Library offers for its students?

A. Well, I couldn't give an exact comparison as to that. I would be disposed to say, at a guess, that the University of [fol. 133] Texas Library area was perhaps larger than the State Library——

Q. Based, again, on the number of students that we have been talking about, which of the two libraries would offer more space and convenience for study?

A. Well, assuming that the State Library is not otherwise crowded by public users, and I think it is not, I would think that the facilities of the State Library would be more spacious for the use of a student body of, say 10 students in the near by school, than would be the facilities at the State University Law Library, which are now exceedingly crowded.

Q. That is, the University of Texas Law Library is now exceedingly crowded?

A. That is correct.

Q. Are you acquainted with the approximate distance

from the Negro Law School over to the State Law Library?

A. Yes, I am.

Q. Approximately how far?

A. Well, I would say it was 100 yards to the door of the Capitol, and then perhaps 25 yards the rest of the distance.

Q. If the evidence in this case should show that the books in the Texas State Library, the number of books, type of books, are substantially equal to those in the University of Texas Law Library, I will ask you if, in your opinion, the [fol. 134] library facilities for the Negro Law School are substantially equivalent to those at the University of Texas.

Mr. Durham: That is a hypothetical question, and we object on this ground; that if it isn't shown, we can renew our motion to strike this testimony.

The Court: Yes.

Mr. Daniel: Yes, that is all right.

Q. Based upon a showing, or substantial showing of the equality in the two libraries, in your opinion, will the library facilities offered the Negro Law School be substantially equivalent to those offered by the University to the University of Texas Law School students?

A. If you would add to that hypothesis that a selected group of books for immediate reference in connection with the class work is available in the quarters of the Negro Law School, and that other books that might be referred to and called for would be available for immediate loan, from the Law Library of the University of Texas, I would answer yes.

Mr. Durham: Your Honor, we ask that that answer be stricken for the reason that the witness asked himself, and he predicated it upon facts not stated by counsel.

The Court: Well, he probably would just turn around and ask him the identical hypothesis.

Mr. Durham: We object again, unless he puts it in there. [fol. 135] Mr. Daniel: I will not bring it up until I compare the books.

Q. Do you have a librarian on the staff at the University of Texas Law School?

A. Yes, we do.

Q. State her name.

A. Miss Helen Hargrave.

Q. Have you asked her to check the books in the State Law Library and make a comparison with the University of Texas Law Library for you?

A. Yes, I have.

Q. Now, I will ask you if you did anything in accordance with this resolution about arranging a list, or having one arranged, of 10,000 books to meet the standards set by the American Association of Law Schools, to be placed in the building that now houses the Negro Law School?

A. Yes, sir, I requested Miss Hargrave to prepare a list of 10,000 volumes meeting the standards of the American Association of Law Schools. She did prepare such a list, and on the basis of that list, as I understand it, an order was made for the purchase of a certain number of the books on that list.

Q. Now then, in accordance with the resolution passed by the Board of Regents, and your instructions from the Chairman of the Board, I will ask you if you did adopt a curriculum for this new law school?

[fol. 136] A. Yes, we did.

Q. Is it, or is it not, the same as the curriculum and courses offered at the University of Texas Law School?

A. That is correct.

Q. Did you adopt the University of Texas courses as stated in your Bulletin of the University of Texas Law School?

A. We did.

Q. Do you have a copy of the bulletin?

A. Yes.

Q. Will you state to the Court on what pages you will find the courses of instruction that were adopted for the new school?

A. Pages 23 to 29.

Q. And you are referring now to the University of Texas Law School Bulletin?

A. Dated August 1, 1945.

Q. Dated August 1, 1945?

A. Yes, sir, that is the last printed bulletin that we have issued.

Q. So your curriculum——

A. I may say that that is the same curriculum which we adopted. We likewise made special provisions for an interim class to enter in March, 1947, in the Negro Law School.

Q. Your general curriculum as compared with that of the University of Texas Law School is the same, is that correct?

A. Yes, sir.

[fol. 137] Q. What about your faculty for the Negro Law School? Compare that with the faculty for the University of Texas Law School. Is that the same faculty?

A. Yes. Mr. Woodward, the Chairman of the Board of Regents of the University of Texas, requested me to consult the law faculty and ascertain their willingness to cooperate in the steps contemplated by the resolution in the founding and carrying forward of the Negro Law School, and the faculty assured me of their willingness to cooperate, and that contemplated, of course, the offering of all necessary courses in our curriculum as the school should develop.

Q. Will you state how the entrance requirements for the Negro Law School as set up by you compared with the entrance requirements for the University of Texas Law School?

A. Well, we adopted and announced that the entrance requirements and the other requirements for admission in the Negro Law School would be the same as in the University of Texas Law School.

Q. What about class room requirements, grades and examination requirements for the new school? Are they the same as for the University of Texas Law School?

A. All of the catalogue regulations for the University of Texas Law School were adopted, and were to govern the Law School of the State University for Negroes.

Q. All of the regulations here in the catalogue for the [fol. 138] University of Texas were adopted by the Texas State University for Negroes; is that correct?

A. Yes.

Mr. Durham: I didn't want to disturb the Attorney General. I want to ask a question for the purpose of an objection. You say the curriculum was adopted. How was it adopted?

A. As I understand, the resolution gave to the Chairman of the Board of Regents of the University of Texas the power to make all necessary arrangements for the establishment of the Negro Law School, and he, consulting with me, directed that the Negro Law School should adopt——

Mr. Durham: You had a resolution adopting the curriculum?

A. No, an announcement was made in writing by myself and the Dean of Admissions of the University, under the instructions of the Chairman of the Board of Regents of the University of Texas.

Mr. Durham: Your Honor, I don't think I made myself clear. Did I understand you to say——

A. Which announces the adoption——

Mr. Durham: Is that in writing?

A. Yes, sir.

Mr. Daniel: We will prove it up. I would like to offer the catalogue referred to.

[fol. 139] (Said instrument was admitted in evidence as Respondents' Exhibit No. 5.)

Q. Now, Dean McCormick, do you have the list of law professors on the faculty of the University of Texas who were made available to teach courses in this law school, this new law school?

A. Do you mean the particular ones who were assigned to teach classes?

Q. First, I would like to have your complete list of the faculty.

A. Yes, sir.

Q. Do you have the qualifications there of those faculty members?

A. Well, simply briefly summarized, not stated in full, giving their degrees and teaching experience.

Q. To save time, I would like to offer that. We just offer it in evidence without reading it. We offer the list of faculty members with the brief statement as to qualifications.

(Said instrument was admitted in evidence as Respondents' Exhibit No. 6.)

Q. Now, Dean McCormick, we have talked about the general curriculum and the faculty members available. I will ask you what particular courses you had already application for at the time you set up the new law school?

A. Well, we had not had application by any student for [fol. 140] admission, if that is what you mean. We contemplated and made ready for an entering class in March.

Q. First year class?

A. An entering class. We have during the war and post-

war emergency period provided for students, in order to accelerate their course, to enter in the middle of the school year, in March; in previous years, and in February of this year, and that was the class that we contemplated and provided for this spring by the immediate assignment of courses and professors for the teaching of such beginning classes.

Q. Then, you specifically provided before the opening of the school on March 10th for instruction in what courses?

A. Contracts, torts and legal bibliography.

Q. Are they the same courses that you offer first year law students at the University of Texas Law School?

A. They are the same courses.

Q. What instructors did you assign to teach those three courses?

A. Associate Professor Leo W. Leary, Assistant Professor S. T. Morris, and Assistant Professor Chalmers M. Hudspeth.

Q. Are those the same instructors that teach those same identical courses in the University of Texas to first year law students?

A. That is right.

Q. Now, you mentioned a minute ago having prepared a written announcement of courses and the opening of this [fol. 141] law school. Do you have a copy of that announcement?

A. Yes, sir, I do.

The Court: We, then, will recess at this period and will take that up at two o'clock.

(Thereupon Court was recessed at 12 o'clock noon May 13, 1947, until 2 o'clock p.m., May 13, 1947.)

Afternoon Session

May 13, 1947, 2 P.M.

Charles T. McCormick, having resumed the witness stand, testified further as follows:

Direct examination (Continued).

Questions by Mr. Daniel:

Q. Dean McCormick, is this the copy of your announcement of courses for the Negro Law School?

A. Yes, it is.

Q. We wish to introduce the announcement.

(Said instrument was admitted in evidence as Respondents' Exhibit No. 7.)

Mr. Daniel: May it please the Court, I will read a few paragraphs of this announcement, and review some of ——

[fol. 142] (Mr. Daniel read to the Court certain portions of said announcement, and summarized other portions of same.)

Q. I will ask you if your announcement contains, the facts stated therein are correctly—are correct representations as to what you were offering there on March 10th?

A. They are.

Q. Now, Dean McCormick, I would like to ask, if in your opinion, the facilities set up at the new law school for Negroes furnishes to Negro citizens the equal opportunity for study in law and procedure as that offered in the University of Texas Law School?

A. Yes, I believe they do.

Q. In your opinion, do you believe that the facilities set up in the Negro Law School furnished to the relator in this case, and would give to him, if he entered, equal opportunities to study law and procedure as he would have if he was admitted to the University of Texas Law School?

A. Yes, they would do so.

Q. Was the school opening—was it opened on March 10th, as announced in your written bulletin?

A. Yes, it was.

Q. Were you down there?

A. Well, I was down there from time to time.

Q. During that day?

A. I don't believe I was there on the first day. There [fol. 143] was no necessity for me being there.

Q. Were you there during the week of March 10th?

A. Yes.

Q. Do you know——

A. I was there previous to that time also.

Q. And previous to that time?

A. Yes.

Q. Do you know the relator, Heman Marion Sweatt, by sight?

A. Yes.

Q. Did he register there at the school?

A. No, he did not.

Q. Is the school still being maintained, ready for instruction of the relator in this case, if he should see fit to enter?

A. Yes, sir, the facilities are held available

Q. When will your next semester begin?

A. That depends on whether we have any applications.

Q. What about your semester at the University of Texas?

A. It begins on the 3d of June, the summer session.

Q. The summer session begins on the 3d of June?

A. Yes.

Q. Are you equipped to begin a summer session, a similar session for the Negro Law School on June 3d also?

A. Yes.

Q. I believe that is all.

[fol. 144] Cross examination.

Questions by Mr. Nabrit:

Q. Dean McCormick, have you at any time examined the qualifications of Heman Marion Sweatt, the relator in this case, for admission to a law school?

A. No, I have not.

Q. Do you know whether he is qualified to enter the law school at the University of Texas?

A. I am so informed by the admissions office, Mr. Mathews.

Q. Did the Registrar so notify him?

A. That is my understanding. Of course, I have no first hand knowledge.

Q. Now, Dean McCormick, in speaking of the faculty of

this supposed Negro Law School, I believe you stated that three professors or teachers at the University of Texas School of Law had been assigned to teach interim courses; is that correct?

A. That is correct. That is, for the first semester.

Q. Leo W. Leroy, is that one of them?

A. Leary.

Q. Oh, Leary. Would you tell us what Mr. Leary taught at the University School of Law the first semester of the current school year?

A. Well, one of the courses that he taught was a course in Federal Regulations, substantive Federal Regulations.

[fol. 145] Q. That is clear. What else did he teach?

A. I don't remember what else he taught. You see, we have seventeen members of the faculty, and I don't remember offhand each of the subjects they teach each semester. I can readily look it up, however, and let you know.

Q. Would it take you—do you have the material here available that you could look it up?

A. No, I don't have it here, but I can get it by telephone.

Q. All right; just before you get it by telephone, and I think we want it, Mr. Chalmers Hudspeth; that is another teacher assigned to that school?

A. That is correct.

Q. What did he teach the first semester at the University of Texas Law School this current school year?

A. During the course of the year he has taught the course in domestic relations, and the course in legal bibliography, but there, again, I don't have at my finger tips what each of these teachers has taught because we have many sections of the courses.

Q. That is all right.

The Court: Would you like to take a minute and find out what you want and let him phone and get it?

Mr. Nabrit: Yes, sir; I think it would be very good.

The Court: Tell him what you want, then.

Mr. Nabrit: I want to know what each of these teachers [fol. 146] taught at the first semester at the University of Texas during the current school year, how many hours each taught, and the second semester, this current semester, I want to know what each of these teachers is now doing, the course by name, hours and what classes. By classes, I mean, first, second or third year classes; those classes normally as-

signed by you for the faculty of the School of Law of the University of Texas.

Mr. Daniel: May I suggest that he get that this afternoon and bring it in the morning?

Mr. Nabrit: I would like to get it now, if he can get it over the phone.

The Court: We can recess a few minutes, and he can go into the Reporter's room.

Further discussion was had off the record, and the witness requested Mr. Mathews to obtain the information outlined above.

By Mr. Nabrit:

Q. Dean McCormick, moving from the faculty for the moment to the building for this proposed law school which is located, as I understand it, on 13th Street, approximately a hundred yards from the State Capitol, in which there is a law library that is available, according to your statement, to the students in this school of law, how many stories are there to this—first, I will ask you, have you visited this building?

A. I have.

[fol. 147] Q. How many stories are there?

A. Three.

Q. The floor on which the proposed law school is located, is that the basement floor?

A. Well, I would call it the ground floor. It is perhaps two or three depressed feet under the ground, but there are ample windows and lights. It is not an artificially lighted space.

Q. So that actually it is a basement floor in that building?

A. It isn't what I understand by a typical basement, which is what is underground.

Q. But it is at least half underground, isn't it?

A. Well, I wouldn't be sure. I wouldn't have thought so, no.

Q. It is a considerable distance depressed from the level of the sidewalk, so that it is necessary to go down several steps?

A. Yes, sir; four or five steps.

Q. In your judgment, does it have adequate windows for a law building, that is, enough daylight, irrespective of

internal illumination? In your opinion, is that a satisfactory arrangement, purely from the standpoint of windows?

A. Yes, it impressed me so. Of course, most law buildings, so far as I know, need in many of the rooms artificial light in the daytime. I know ours does at the University of Texas.

[fol. 148] Q. Probably if you were securing one today, you would look at that as one of the things that you would insist upon in the building, would you not?

A. No, I wouldn't insist on a building that didn't need artificial light in the daytime in all of its rooms.

Q. I mean, in looking for a law building for the University of Texas, that would be one of the things you would take into account?

A. The adequacy of light, yes.

Q. All right. In the second place, in respect to that building, is it in your opinion adequate in size, this basement floor, which is, as I understand it, the only part of that building now under your control. Is there in the basement adequate space to place library stacks sufficient to hold these 10,000 books which are supposed to have been ordered?

A. No, there is not.

Q. Do you, of your own knowledge have at this moment information as to where those books will come, if they should arrive, where would they be placed?

A. Well, my information comes from Mr. Woorward, who is the Chairman of the Board and has the responsibility for the providing of physical facilities, and I understand from him that he has arrangements perfected whereby the University has an option on the remainder of the building, and when the entire building is put into use it would [fol. 149] be, of course, considered as a whole as to how the space would be utilized, and just which room or rooms it would be decided to put the library in, I couldn't say.

Q. Who would decide that? Not the Board of Regents, you don't mean that?

A. Yes, they would decide upon——

Q. They would decide in what room you would have your classes and what rooms you would have your offices and your library?

A. Well, they would ultimately. The advice of the Dean

would, no doubt, be taken, and that of the business agents of the University.

Q. And no doubt the Dean's advice would be decisive in regard to arrangements in the building?

A. Probably so. That is if it didn't cost more than the University could command in the way of money.

Q. That is, if it didn't exceed that $100,000.00 which we are supposed to have?

A. That is right—I wouldn't say "supposed to have". I believe it has been appropriated.

Q. I don't know how much of it has been expended, therefore, I supply that phrase. You may be able to tell me later how much we have left. This question, Dean McCormick, in considering the announcement for the opening of school on March 10th, I take it from your testimony [fol. 150] that no library was available in the school at that date, nor at that date did the school possess any place in which it could have placed these 10,000 books; is that true?

A. Well, there was a small selection of reference books immediately accessible for these three courses in the building.

Q. That is right, but I am speaking of the 10,000.

A. No, there was no adequate space immediately provided, for the simple reason that getting the books is a matter of some time, and——

Q. *Your Honor, I wish you would just strike—have the* last part of that stricken.

The Court: That is right. It is by way of explanation, but probably wasn't responsive.

By Mr. Nabrit:

Q. Dean McCormick, you are former President of the Association of American Law Schools?

A. Yes.

Q. And as I understand it from articles which you have written, one of the proponents of increased standards for law schools, is that true?

A. Yes, sir; I believe in raising the standards of legal education generally.

Q. The University of Texas is a member of that Association, is it not?

A. That is right.

[fol. 151] Q. Are you familiar with the handbook of that association?

A. Well, it is a large volume.

Q. I mean by that you know that——

A. Generally, yes.

Q. Do you know John P. Dawson, who is Secretary of the Association?

A. Yes, I do.

Q. I would like to show you a copy of that. Do you have any objection to this?

Mr. Daniel: No.

Mr. Nabrit: No objection. I would like to enter this. Now, I would like to call the attention——

A. Would you tell me what year?

Q. I am going to call your attention to this——

A. Will you tell me what year that was?

Q. I want you to read the published letter of the Secretary-Treasurer certifying it.

A. 1945 Handbook?

Q. Yes. Are these the rules now in force in the association, to your knowledge?

A. Yes, they are.

Mr. Daniel: No objection.

Mr. Nabrit: We would like to introduce, Your Honor, pages 259 to page 269, inclusive, which carry the articles of the association, and the names of the members of the [fol. 152] Association of American Schools of Law.

A. I believe you want to confine that to Article 6. I believe that is the one that contains the standards.

Mr. Nabrit: Article 6 on page 260, 261, all of it from Article 6 on.

(Said instrument was admitted in evidence as Relator's Exhibit No. 1.)

By Mr. Nabrit:

Q. Now, Dean McCormick, are you familiar with the rule of the Association of American Law Schools which states in substance that in order to be accredited by this Association a law school must have a minimum of four full time professors or teachers of law?

A. I am familiar with that.

Q. In your opinion, is the arrangement which you have made for the faculty at this Negro Law School, which was to be effective March 10, in keeping with that requirement?

A. No, I don't believe that it complies with that requirement, but I believe that the faculty, the facilities which we have furnished to the Negro Law School, is equal to those that——

Mr. Nabrit: Your Honor, I would like to ask that all of the witness' answer from "but" be stricken.

The Court: I don't think it was by way of explanation either, so I believe he could have stopped there. It may be pertinent on cross examination.

Mr. Nabrit: Yes, we will stop it right there, please.

[fol. 153] Q. Dean McCormick, in assigning that faculty to the law school, or the Negro School of Law, were they to teach courses at the University of Texas at the same time? I don't mean the same hour, but I mean during the same semester that they were to each in the Negro Law School?

A. That is true as to Mr. Leary and Mr. Morris, but not as to Mr. Hudspeth, I believe. He had taught the course in legal bibliography the previous semester, but my recollection is that he is not teaching it this semester. I am not quite certain about that, but that information will be verified.

Q. Do you recall what the usual number of hours a teacher at the University of Texas School of Law is required to teach?

A. Well, it varies from time to time with the necessities of the curriculum, and it runs usually from five to eight hours of teaching per week in a given semester, and I would say on an average of about six.

Q. It seems that information is here. If it is I would like to ask him those questions right here.

The Court: Yes.

(Thereupon Mr. Daniel delivered an instrument to the witness.)

A. Do you want me to give this information to you now?

Mr. Nabrit:

Q. I would like for you to tell me what the three teachers assigned to the Negro Law School taught at the University

of Texas the first semester of this year, and what those [fol. 154] teachers are teaching at the University of Texas Law School the second semester.

A. Mr. Leary during the first semester was teaching Equity I, a three semester hour course, and the seminar in Federal Regulations, a two semester hour course, and he is teaching now in the second semester Contracts, which is a six semester hour course. Mr. Hudspeth during the first semester was teaching Procedure I, a four semester hour course, Legal Bibliography, two sections, each of one semester hour. During the second semester he is teaching Agency in two sections, of two semester hours each, and Domestic Relations, three semester hours. Starling P. Morris during the first term was teaching Personal Property, a three semester hour course, and Legal Writing and Argument, a two semester hour course. During the present semester he is teaching Torts, a six semester hour course.

Q. Now, Dean McCormick, how long has Mr. Leary been teaching at *at* the University of Texas School of Law?

A. He began his teaching last fall.

Q. This year is his first year?

A. That is correct.

Q. How long has Mr. Hudspeth been teaching at the University of Texas?

A. The same length of time.

Q. He began last fall?

[fol. 155] A. Well, now, I may be mistaken. He may have begun last summer.

Q. Let's say last summer, but this is his first year, and, Dean McCormick, how long has Mr. Morris been teaching at the University of Texas?

A. I think he probably began last summer, and has been teaching since that time.

Q. Do you recall, Dean McCormick, whether or not the teachers of the first year law students at the University of Texas, and I am not asking you to try to remember which sections they have or anything of that sort; just whether out of the total number of teachers at the University of Texas Law School who are engaged in teaching first year law students, whether there is a single teacher who has been teaching law longer than one year?

A. Well, I would have to go over the list.

Q. Here you are.

(Mr. Nabrit handed the instrument to the witness.)

A. Yes, there are some.

Q. Do you know by looking at the list of the faculty which ones they are, and how long they have been teaching at the University of Texas, or teaching law at other universities?

A. Yes.

Q. Could you state those, please?

A. Mr. Davis has taught since 1940 in the University of [fol. 156] Texas, and from 1935 to 1940 at the University of West Virginia. Mr. Huey has taught, except for war service, at the University of Texas since 1936. Mr. Morris, Clarence Morris, taught at the University of Wyoming, 1926 to 1940, and the University of Texas since 1940, and Mr. Jerry S. Williams came to the University in 1946, and I believe he had had two years of previous teaching.

Q. Thank you.

A. I think I should explain that by qualification, however, to this effect; that the first year class which entered in February, beginning class, which corresponds most nearly to the beginning class in the Negro Law School, was taught only by teachers of this same experience, that they entered law teaching last fall, or last summer, with the exception of the one of the course in Legal Bibliography, which was taught by Miss Hargrave, to that group, and she has had several years of teaching experience in the field of Legal Bibliography.

Q. Let me ask you this, Dean McCormick. In the assignment of this faculty to the School of Law, to the Negro School of Law, how was that assignment made, by lot, by designation, or by volunteering, just what method produced these three individuals as the faculty?

A. Well, it was done by myself, after consult--tion with other members of the faculty.

[fol. 157] Q. Were these teachers——

A. Including the teachers themselves.

Q. Yes. Were these teachers to receive under the arrangements which you had in mind at that date, March 10th, were they to receive their salary from the Negro Law School or from the Law School of the University of Texas?

A. Why, I would assume from the Negro Law School. As I understand the legal element, the Board of Regents of the University of Texas were to administer the financial

affairs of the Negro Law School until the time of the permanent organization of the University for Negroes.

Q. Maybe we can get it another way and bring it within your knowledge. Had you made plans for adding three other members to your faculty in place of these three who were going on the pay roll of the Negro Law School on March 10th?

A. No, these men were to continue their teaching at the University of Texas School of Law.

Q. Were you to continue them on the pay roll?

A. That is correct. They would get their same salaries, but—I mean they would get the same salaries they had previously gotten at the University of Texas Law School and would be paid extra compensation for the work in the Negro Law School.

Q. Under that arrangement that existed in the University of Texas Law School for these three persons for the second semester, each of them had a load of from five to six hours. [fol. 158] If they taught in the Negro Law School first year subject, Torts and Contracts, four and six hour courses, would that not have been in excess of the hours which you use as your standard at the University of Texas? You said it varied from five to seven or eight?

A. It would have been an addition to their usual load, rather larger than usual, but I may explain this, that in the case of the two larger courses, Contracts and Torts, they would simply be teaching additional sections of the same subject with the same books, and the custom in law schools is to count that as only one-half of the corresponding number of hours of non-repeated course; so it would amount, under the custom of law schools, to a nine hour weekly load, which is heavy, but not excessive.

Q. But it is heavier than what you have as your usual load at the University of Texas?

A. Yes.

Q. Because the American Association thinks when you pass eight, you are watering down your instruction?

Mr. Daniel: Well, we object.

Mr. Nabrit: I withdraw the question.

A. I don't believe that is a fact.

Q. Yes. Is it your opinion, Dean McCormick, that law school students get the full use of a law library, assuming it is an adequate one for books, from that standpoint for the

[fol. 159] moment, is it your opinion that they get the best use out of this library without a librarian who is there to serve students and teachers, people who are engaged in study and research?

A. I think a librarian is, of course, necessary for the operation of a library for the benefit of students or anyone else.

Q. Who was the librarian for the Negro Law School on March 10th of this year?

A. Well, we had not formally appointed a librarian, but Miss Hargrave, for a considerable period of time gave a great deal of service to the planning and provision of the library arrangement.

Q. Under the standards of the American Association of Law Schools, it is stated that in order for a school to qualify it shall have been in operation for a period, usually, for approximately two years, and then upon inspection by the Association, if it meets their standards, it will be accredited?

A. Two years is the minimum time, as I understand it.

Q. Yes, that is what I say. Now, is it your opinion that a law school that is not accredited is for the purposes of accreditment equal to the law school of the—to the University of Texas Law School?

A. I don't understand that question.

[fol. 160] Q. Well, let's put it another way. The Association of American Law Schools accredits certain law schools based upon those schools having reached certain accepted standards which are known to all people in the field of law in rating law schools on that basis. If I look in this book and see the University is listed as a member, I know it meets these minimum standards. Now, for the purpose of accreditment, that is, for that purpose, is a law school which is not accredited as a member of this Association equal to the University of Texas School of Law?

A. For the purposes of accreditment, why, obviously, a law school that is not accredited does not equal one that is accredited, but I still don't catch the significance of the question.

Q. It will follow. Is this Negro Law School which was open on March 10th a member of the Association of American Law Schools?

A. No, it is not.

Q. Is it accredited?

A. Not in that sense, no.

Q. In what sense is it accredited?

A. Well, you mean by accredited, the opinion of people familiar with the situation and with the law school, their opinion as to the value of the facilities and instruction, why, then, it is accredited in that sense, by those who hold the favorable estimate of it. If you mean accredited by the Association of American Law Schools, why, it is *is* not.

[fol. 161] Q. I mean, is it accredited in the sense in which educators in the field of law speak of accreditment of law schools?

A. Well, they usually speak of it in the sense of being a member of the Association of American Law Schools, and of being an approved school on that list of the American Bar Association.

Q. Is a student at the University of Texas School of Law permitted under the regulations of the University of Texas and the School of Law at the time he is engaged in the study of law at the Law School, to also take courses in the University of Texas, for example, Political Science, Economic Theory, or some other course, Philosophy?

A. Yes, he is, provided the total amount of hours does not exceed fourteen.

Q. Now, where were—are these students of this Negro Law School to study courses like those, Economics and Political Science, under the set-up which you have stated has been adopted under your faculty?

Mr. Daniel: Your Honor, we object to that question because it is going into a field wholly irrelevant and immaterial to any issue in this case. Relator has sued for entrance into the Law School, says he has been denied the right to study law and procedure, and hasn't alleged that he cares to study anything else, and going into these other fields would certainly be beyond the issues of this case.

[fol. 162] Mr. Nabrit: If Your Honor please, one of the things alleged by the relator is that in not being admitted to the University of Texas he is being denied equal opportunity with the students who do enter it. One of these opportunities is this opportunity to study, and the Dean has testified that the students in the law school do have that right, and I think it is quite——

The Court: I will let him answer it, if he can.

A. You say where is he to study?

By Mr. Nabrit:

Q. Yes, sir. Where is he to get these courses in Economic Theory and Philosophy and other courses offered by the University of Texas which are available to the students in the University of Texas School of Law?

A. I could not answer that question. There are—in so far as it assumes any common practice or any encouragement by us of that practice in the University of Texas School of Law, it is unfounded.

Mr. Daniel: I would like to preserve our bill of exception on this testimony as to other courses not mentioned in relator's petition.

The Court: Yes, sir.

A. If I might add to the question, I would say that it is customary that law students do come prepared in the fields of economics and government and similar courses, and [fol. 163] that we do not encourage them to take courses outside the School of Law when they are in the School of Law, because it tends to disrupt the regular progress of their law studies.

By Mr. Nabrit:

Q. I agree with that, but you also do not forbid it?

A. No, we do not.

Q. And, as a matter of fact, you do have students at the Law School who not only take these courses, but take graduate courses, is that not true?

A. Well, if there are, they are very few. I don't keep close enough check on the actual registration to know whether there are actually in the law school now students who are taking academic courses, but it is a very nominal element, if any.

Q. So far as you know, the students at the Negro School of Law have no place where they could take those courses under your plans and arrangements?

A. I have no information about that.

Q. As a former President of the American Association of Law Schools, and as the Dean of several law schools, and as an outstanding authority in several fields of law,

Dean McCormick, do you—are you of the opinion that one of the basic elements in a great law school is the history and traditions which have been built up over years of time, including the graduates who have become famous in the [fol. 164] State of Texas? Is that your opinion—that is an element in a great law school?

A. Yes, that is a source of pride to a law school that has that background.

Q. One other question on that along that same line. Is it, in your opinion, a good thing for a law school to be unstable as to its location, and to its faculty, sort of a roving school of law? Is that, in your opinion, an unsatisfactory condition in which to operate a law school?

A. I would think that a roving law school would certainly not be an ideal school.

Q. Now, taking this hypothetical question, and assuming that the evidence will bear out the assumptions, if they have not already been proved, if a law school such as this Negro Law School, in its proposed location, with a faculty carrying a heavier schedule than the usual number of hours carried by the faculty of the University of Texas School of Law, without access to any University facilities other than the School of Law, with no accreditment, with an uncertainty as to its permanence in its present location, with library—with no library whatsoever in the building—and with inadequate space for housing a library, if the books were available, and with a faculty of instructors who are beginners in teaching law, a law school equal to the [fol. 165] Law School of the University of Texas?

A. Well, wouldn't you have to add some other elements in your description? That doesn't describe a law school. It doesn't tell the expected numbers of students or the actual numbers of students in attendance, and the facilities for small, as compared with large classes.

Q. Suppose, Dean McCormick, you answer mine that way, and then we will take the other. Take my hypothetical question. Is that law school which I have described equal to the Law School of the University of Texas?

A. I will say that I can't answer the question because your description is not complete, and you would have to give the expected number of students, and you would have to suppose a certain ratio of students to faculty, and a certain size of the classes.

Q. If we are going to assume that, I would have to assume a certain number of graduates and a certain number of authorities on the faculty in the field of damages and other fields, and I would have to assume a certain number of judges. You see what I am trying to get from you, as one of the outstanding men in the field of legal education, is an answer on that type of school. It might not have some other elements that some other school might have, or that some other hypothetical question might give it, but I would like that opinion on that type of law school.

[fol. 166] A. You are contrasting what to me seems to be an incompletely described school with a school I know all about, and I can't take a fragmentary school and compare it with a school that I know about.

Q. Let's put it that way. Would that "fragmentary" described school in my hypothetical question equal the Law School at the University of Texas?

Mr. Daniel: We object to that question because the fragmentary school in the question leaves out matters which have been proved so far without any dispute in this case; leaving out elements that make the hypothetical question absolutely irrelevant and immaterial, and inadmissible in this case for any purpose.

The Court: I think he would have a right to make up his hypothetical case anyway he wanted to. It is purely imaginary.

A. If he is going to imagine; I can't make a comparison unless he imagines the numbers of students.

The Court: A hypothetical question presupposes a lot of things that may or may not be true.

By Mr. Nabrit:

Q. Is that school, Dean McCormick, equal to the law school of the University of Texas?

A. Well, I would say that if you presuppose a class, a small class, of not to exceed 10 entering students there, [fol. 167] that then the facilities there and the law school in that situation, as it is now, would compare favorably.

Q. That isn't the hypothetical question.

A. With the University of Texas as it is now.

Q. That isn't the hypothetical question, Dean McCormick.

What this question is, is the school which I described equal to the Law School of the University of Texas?

A. Well, I would say yes, if you will presuppose a small number of students to which those facilities are adapted. If you are presupposing a larger number of students, to which those facilities are not adapted, I would say no; but I can't compare a law school with no student population presupposed with a law school where I know the student population, and I know the ratio of faculty to students, which is a very material factor in comparing law schools.

Q. My law school doesn't have all of those factors in it. My law school is the one in this hypothetical question. If it doesn't have something you think a law school should have you just answer it, because mine doesn't have that. Is my hypothetical question, the law school in that, equal to the Law School of the University of Texas without anything——

A. Without any students?

Q. Without anything other than my hypothetically stated question.

A. Which would presuppose that there were no students. [fol. 168] Q. Is that equal to the Law School of the University of Texas?

A. Without any students, it is not.

Q. My question—I have stated all of the factors in my question that I want. Is that school equal to the Law School of the University of Texas?

A. As I said before, I am unable to make the comparison in my mind between the school having only the elements that you describe, without any description of the student body. I am unable to make that comparison.

Q. In other words, you want to fix my school. You see, I want to fix it. That is the best answer I can get. I will ask you another question, Dean McCormick. You stated in your direct testimony that as a result of studies made by you or some member of your staff on the University of Texas, that they had ascertained that there were 53 square feet of floor space per student at the University of Texas School of Law?

A. That is correct.

Q. And then on some basis you arrived at this figure; if I am quoting you correctly, that there are 106 square feet per student at the Negro School of Law?

A. I said that was on the assumption of 10 students.

Q. Where did you get those ten students from?

A. We haven't gotten them.

[fol. 169] Q. Why did you pick ten?

A. Well, I picked ten as just an arbitrary figure of what I thought would be about the maximum of the student body of the beginning Negro Law School in Texas under normal conditions where no, where there was no influence that discouraged them from coming.

Q. What about where there was an influence to encourage them to come? Could we take 150 students and assume the influence is discouraging them? Divide that by that. We will only get 10 square feet per student.

A. It is a matter of which is the more reasonable assumption.

Q. Let's take the hypothetical question, and let's compare 150 students, and then ask you is it equal to the University of Texas School of Law?

A. Presupposing those other factors included, including the present quarters assigned to the law school, they are inadequate for 150 students. Consequently, my answer would have to be accordingly.

Q. Thank you. Dean McCormick, did I understand you to state that the Negro Law School had adopted these announcements and courses and other things as a part of that law school for Negroes?

A. That is correct.

Q. Now, where is the moot court in this Negro Law School? I see here the moot court. That is where—what [fol. 170] arrangements under the faculty for the Negro Law School are there for this law group competition and the moot court?

A. Well, that, of course, has not been instituted. It can't be instituted until you get some students.

Q. But when you have got the place and—a place for it?

A. There would be no trouble about the place for it.

Q. Where is the place in ~~this~~ building across from the Capitol?

A. Well, any one of the class rooms could be used for that purpose.

Q. So one of those class rooms is for moot court?

A. It is certainly susceptible to that use. Of course, we don't have that in the beginning semester of the first year.

Q. Where does the first year student—I will ask you this first—I withdraw that. In the University of Texas School of Law is the first year law student permitted to visit the moot court?

A. Well, the moot course is now given in the course in Legal Argument, and it consists of competition in cases between groups of students. As I say, that isn't given in the first year.

Q. Your answer wasn't responsive to the question. The question was, are the first year students of the University of Texas permitted to visit the moot court, sit in and hear the cases?

A. I presume so.

[fol. 171] Q. I mean, do you know?

A. Well, the preliminary arguments, nobody visits them, they are not worth visiting. The last argument, it is customary for some visitors to attend, including, of course, the first year students.

Q. Do the students of this proposed Negro Law School in the first year class, or did they on March 10th, 1947, have access to such a final competition?

A. No, they did not.

Q. What scholarships are available to the students at the Negro Law School? Are these that I find in here that have been adopted? This has been adopted. Are these available to the students, on page 10, law scholarships and loan funds, of Respondents' Exhibit No. 5; are these law scholarships and loan funds available to students, were they available to students in the Negro Law School on March 10, 1947?

A. No, they were not. I may say that those are mostly, in fact, all of them are contributed from private sources, and not contributed by the public funds.

Q. They are available to the students in the law school of the University of Texas?

A. Yes.

Q. And they are not available to students in the Negro Law School? On page 8 of this same exhibit under "Honors and Aids", I notice the Order of the Coif. That is, as I [fol. 172] think you will agree is one of, if not the highest, legal honorary societies, and honor students in the upper tenth or upper number of the graduating classes at the University of Texas School of Law are eligible for that, is that not so?

A. That is correct.

Q. And their grades are taken from their first year right on up to the time that they are chosen, together with character and other qualifications?

A. Yes, that is right.

Q. Were those honors, or that particular honor available to a student at the Negro Law School on March 10th? Could his grades then begin to accumulate so as to give him an opportunity for the Order of the Coif?

A. Not unless that Order of the Coif should later authorize that school to confer that award. The Order of the Coif, again, is a privately constituted, rather than a public organization.

Q. Yes, but it is operated by the faculty in the Law School in the University of Texas?

A. That is right.

Q. So that to all intents and purposes it is a faculty, locally guided and directed organization?

A. That is right.

Q. Now then, it is obvious—I won't say it is obvious. We will strike that out. The Order of the Coif is only found [fol. 173] at accredited law schools; is that not true?

A. I believe that is right.

Q. The minimum period in which this law school could be accredited would be two years, a minimum of two years after it had been in operation?

A. That is right.

Q. So that we would know thereafter the applications would go to the Order of the Coif for a Chapter, so that any student who entered on March 10th would have finished school before an application for the Order of the Coif would have been proper and in a position to have been acted on? That is just a mere matter of time, and assuming everything else went exactly as it should go, and we had a fine school, and it was accredited, the time wouldn't permit the establishment of an Order of the Coif so that you could get the student elected prior to his graduation?

A. I think it would be unlikely.

Q. On page 12 of this same exhibit, Dean McCormick, there is a paragraph, two paragraphs under the heading "Legal Aid Clinic." How does that clinic operate?

A. Well, it is operated by a part time director, Mr. Woodrow Patterson, an Austin lawyer, who in conjunction

with students in the University of Texas Law School, carries on legal aid for persons unable to pay a lawyer, and the cases come to the Legal Aid Bureau, and they are handled [fol. 174] by the students under the direction of Mr. Patterson.

Q. Are the students who assist in this work at any time first year law students?

A. They are not.

Q. They are second and third year students?

A. Practically all third year students.

Q. Third year students. Now, on page 9 of Respondents' Exhibit No. 5 there is a paragraph headed "The Texas Law Review". Would you describe the classification of students who are eligible to work on The Texas Law Review?

A. The second year students, or rather students beginning in the second year, if they have a grade of approximately 80 or above, are invited to compete for the Texas Law Review, and at the middle or the end of their second year they may be elected to the Board of Editors.

Q. Now, in connection with these scholarships, keeping those in mind, the Order of the Coif and The Texas Law Review, all of which in a school of law go to the better students, or the students with the better records, better ability or more ability; in your opinion, Dean McCormick, are these, the scholarships, The Texas Law Review, and the Order of the Coif, incentives for a higher scholastic activity on the part of the students of the Law School of the University of Texas?

A. Yes, I think they are.

[fol. 175] Q. So, that any student who enters the University of Texas School of Law as a freshman and who reads this or who hears it discussed or finds out who won these honors, if he has it in him, he wants to qualify at some time, and that has a bearing on his work?

A. Yes, it does.

Q. What, on March 10th, was there over at the Negro Law School to stimulate this scholastic activity of a nature similar to these three?

A. You mean what was there?

Q. Comparable. What did you offer? What was offered a first year law student on March 10th at the Negro Law School which was of the same incentive value as a scholarship?

A. Why, the influence which was comparable, and which I think would have served as an equal if not greater stimulus, was the increased contact with the faculty, due to the probable smallness of the student body.

Q. And you think that that would take the place of the value and effect of competition?

A. Well, there is always competition in every class, as you know, for grades, and that is a much more important competition than these extraneous matters of Coif and Law Review, the natural instinct of every able student to cope with his fellows, and it is fine in the training for his profession. That is the most important influence, that natural [fol. 176] intellectual impassion, which is stimulated by contact with good teachers.

Q. So that you consider the University of Texas Law Review an extraneous matter?

A. Yes; it was founded by the lawyers of Texas, not by the State of Texas, and is financed by their contributions.

Q. And you consider honors at the University of Texas School of Law as extraneous?

A. Well, you mean the honors, the Order of the Coif and Texas Law Review?

Q. Yes.

A. Yes, they are minor and extraneous.

Q. How about these cash scholarship awards; are they extraneous?

A. They are in the sense that I have been speaking about. They are very microscopic influences. They are not large elements in the picture at all.

Q. So that so far as the University of Texas is concerned, it might as well get rid of all of those?

A. No, certainly not.

Q. Then they are of sufficient importance for us to ask again why, what was offered on March 10th to the law school student at the Negro Law School comparable to these? You say they are adopted. I want to know if——

A. Do you mean, do we have any system of awards beyond the natural competition in the classes themselves?

[fol. 177] Q. No.

A. And the incentive of grades, or success in the courses? None are provided for, if you mean were there any scholarships or prizes or Law Review.

Q. Then, you don't mean that this was adopted?

A. I don't mean that, because none were provided for in the first semester, that that would not follow as a course of the natural evolution of a well-conducted school.

Q. Then, Dean McCormick, you don't mean that this was adopted for the Negro Law School?

A. Well, so far as applicable to a school just starting with an anticipation of one entering a beginning class.

Q. The first year student at the University of Texas Law School, everything in here is applicable to him unless it is specifically stated that it is not applicable; is that true?

A. Well, that is a large order. I am not prepared to say offhand without scrutinizing all of the regulations.

Q. As you stated a moment ago, one of the important elements in the School of Law is competition, in your opinion, one of the most important. A law student who entered the University of Texas on March 10th, 1947, would have the competition of several hundred law students from all over the State of Texas, including the opportunity for hearing legal discussions by upper classmen, and engaging in [fol. 178] them with them. What about the law school for Negroes on March 10, 1947, did that law school offer to relator in this case that type of competition?

A. Well, I really think if you have a small class that the—where everyone knows each other, and his capacities, that the competition is, if the level of the class is fairly high, is apt, perhaps to be more intense than in an eight or nine hundred student group, where a given student knows only a small number of the total student body.

Q. Of course, that isn't responsive for the reason that you injected the question of the level of attainment of the class being high, which you, of course, agree is an assumption that we would not be able to validate, in the absence of the presence of students and a review of their I. Q. and their preparation; is that not true?

A. Well, our entrance requirements are at least three years of college for non-veterans, and at least two years of college for veterans, with a grade requirement of C or better, and I believe that that makes fairly sure the attainment of high level of intellectual quality. Of course, it is all relative.

Q. You assume that—you have no way of demonstrating that if your numbers become smaller?

A. No, it is a matter of observation and experience. I

have taught small classes and large ones, and I am inclined [fol. 179] to think that the competition in a small class may well be at as high a level as it is in a class of 150.

Q. Now, Dean McCormick, are the facilities which have been set up for this law school for Negroes, are the facilities equal to the facilities at the Law School of the University of Texas, and I will explain then so that you will know what I mean. I mean the library, I mean the building. In the building I mean the offices, class rooms, lavatories, locker rooms, lounge room, librarian's office, the professors' offices, the recreation room. I mean all of those facilities in the building; are they, in your opinion, equal to those at the University of Texas School of Law?

A. Well, facilities are things that are to be used. Their quality is relative to how many and what kind of people are going to use them. Now, if you ask me, for the purposes of the relator, or of a small group of applying students, as compared with the adaptability of the University of Texas Law School facilities for its present student body of 850, I would say yes, they are equal.

Q. What I would like to know, just two points; (a) and (b), one a Negro boy and one a white boy, and one going to the University of Texas and one going to this Negro Law School, isolated from other students. Will the facilities which the white boy finds at the University of Texas, or [fol. 180] are the facilities which the Negro boy finds at the Negro Law School equal to the facilities the white boy finds at the University of Texas Law School?

A. I would say yes, with this explanation; that if that young Negro student goes to the Texas State University for Negroes School of Law, either alone or with a small group of fellow students, and enters the class there with the three faculty members assigned, compared with the University of Texas Law Schools entering on February 1st with a group of 175 other students in a law school already overcrowded twice its capacity, why, I would say, yes; the Negro student has at least equal and probably superior facilities for the study of law.

Q. So that you think that the Law School for Negroes has superior facilities to those at the University of Texas?

A. I said at least equal, and probably superior.

Q. Now, irrespective of numbers, point out the superiorities in this, in the facilities in this Negro Law School?

A. I can not answer irrespective of numbers, because you are talking about facilities for human beings to be taught law by other human beings. To say irrespective of numbers, are your facilities equal or superior, or what not, is meaningless to me. I can't attach any meaning to that.

Q. I can agree with that. The only thing, you wish to take ten, and I would like for you to take 150, so that we [fol. 181] would have one-sixth of the population of it. We have about 850 at the University. Take about 150. Based on the population, at least, we have a basic reason for taking that number.

A. We have this basic reason for taking 10, that the University had received inquiries, I am informed by the Registrar, of approximately, did receive about 14, and so with that number of inquiries it is reasonable to assume that something less than that would be the practical number to anticipate as entering the law school, if there were no influences preventing them from entering.

Q. Do you think that as valid a basis for that conclusion which you came to might just as well be that the law school had moved from two cities inside of a month, and that that, in itself, would create that type of thing, without determining the number of persons who wanted to study law? Wouldn't that be valid?

A. I didn't undertake to say what the influences were that kept them from coming. I undertook to say what the indication of the maximum apparent immediate demand under the circumstances was.

Q. Let me ask you this, Dean McCormick. What, in your judgment is the maximum capacity of the proposed Negro Law School in its present location, based upon the same sort of overcrowded condition which exists at the University of [fol. 182] Texas School of Law?

A. Well, are you assuming the acquisition of the entire building, or assuming the present lease upon the ground floor?

Q. I am taking only what they have, that is the ground floor.

A. Well, I would say that it could accommodate 12 to 15.

Q. I would then ask you if the present facilities for the Negro Law School, which in your opinion would accommodate a maximum of 12 to 15 students, are equal to the facilities at the University of Texas Law School which—from

those figures we take 886 as the maximum—accomodate 886 students as a maximum?

A. They are not equal in size, no.

Q. Are they equal in quality?

A. Yes, for that number of students, I believe that they are.

Q. Well, we have the maximum of each, you see. We have the maximum student body. Are they equal in quality to the maximum student body in each?

A. I am afraid I was—I thought you asked me the maximum appropriate student body for that size quarters, and you are—I think I misunderstood your question. You intended to presuppose an overcrowded condition commensurate with that at the University of Texas. Well, I think you would have, in that case, you would have to double the estimate that I have made of from 12 to 15, to 24 to 30.

Q. All right. Let's double it. Then, at the maximum ca- [fol. 183] pacity, are those facilities equal to the facilities in the law school in the University of Texas to their maximum capacity?

A. To their present overcrowded condition, you mean?

Q. Yes.

A. Yes, I think so.

Q. You see, we are assuming both overcrowded?

A. Yes.

Q. And you say they are equal in quality?

A. They provide for 25 or 30 students about like the University of Texas premises provide for 850 students.

Q. Dean McCormick, are you familiar with some of the early history of the Law School of the University of Texas?

A. Generally so.

Q. Do you recall the early enrollment at the Law School of the University of Texas, about the time that building was erected that is now there, roughly; not any exact figure?

A. No, I do not, but I would say it was somewhere between two and three hundred, but it is just a guess.

Q. Do you know how many students, or do you recall how many students there were at the University of Texas Law School the last year before the war?

A. Approximately 750.

Q. Approximately 750; and roughly,——

A. At least that was true in 1939, before the draft went into effect.

[fol. 184] Q. At least, you consider that your last normal year?

A. Yes, I believe I do.

Q. In your opinion, was the present law school building for the University of Texas erected for a small number of students?

A. Yes, that is my understanding, is that it was contemplated that the maximum would be about 400.

Q. About 400?

A. Yes.

Q. Now, then, in your judgment, is the contemplation and the plan for this Law School for Negroes equal to that type of planning?

A. Would it be likely to have a similar development?

Q. Yes.

A. That is corresponding to a growth from 250 to 750 in the course of 30 years?

Q. Several years, or whatever number——

A. That would be about 30 years.

Q. Yes.

A. Well, I would suppose that it would be something of a similar growth.

Q. That is all.

The Court: We will take a few minutes.

Court was recessed at 3:30 p. m., until 3:50 p. m., May 13, 1947, at which time proceedings were resumed as follows:

[fol. 185] Redirect examination.

Questions by Mr. Daniel:

Q. Now Dean McCormick, I believe you have already testified that the basis of 10 students and your planning on that basis was arrived at by reason of the number of inquiries made. I will ask you if you had ever before establishing this school received more than the one application for attendance at the Law School at the University of Texas from a Negro?

A. No, I have not.

Q. Going back to the matter of legal aid, is that a private set-up that is run there at the school to give legal aid to outsiders?

A. No, that is part of the Law School.

Q. Are any first year students entitled to participate in that legal aid program?

A. No, they are not.

Q. The Order of the Coif, is that a private organization operated there at the University Law School, Texas University?

A. Yes.

Q. Are first year students entitled to admission?

A. No, that is awarded only at the time of graduation.

Q. Are first year students entitled or required to participate in moot court?

A. No, they are not.

[fol. 186] Q. Are first year students entitled to places on The Texas Law Review?

A. No, sir.

Q. Is The Texas Law Review a private organization?

A. Yes, it is.

Q. I believe you said that the scholarships and loan funds were private set-ups, not furnished by the State?

A. The money came from private donors.

Q. Are all other things provided at the University of Texas Law School by State funds such things provided for first year law students by State funds, provided for Negro law students in the Negro Law School from State funds?

A. That is right.

Q. Now, it was mentioned several times on cross examination that you could not be accredited by the Association of American Law Schools without some students, and that you could not organize these various honor societies without students. Have you done anything whatever toward discouraging students from enrolling in the Negro Law School?

A. Quite the contrary. We hoped very much for an enrollment of a reasonable number of students after we had made the provision for training them.

Q. In view of these inquiries and applications received prior to March 10, 1947 did you anticipate having at least some students on the morning of March 10, 1947?

[fol. 187] A. Yes, I felt very confident that we would have at least five or six students. You said in view of applications. We didn't have applications, but inquiries.

Q. Inquiries. Now, if the relator had been admitted to

the University of Texas Law School for the spring semester, who would have instructed him in Contracts?

A. Mr. Leary.

Q. Mr. Leary?

A. That is right.

Q. The same professor that you provided to instruct him in Contracts in the Negro Law School?

A. That is right.

Q. Who would have instructed him in the University of Texas Law School in Legal Bibliography?

A. Why, I believe that Miss Hargrave had charge of the sections of Legal Bibliography of the group entering in February.

Q. If he had entered the previous semester, who would have taught him Legal Bibliography?

Mr. Durham: We object to that. There is no claim of any negro school in existence at that time.

By Mr. Daniel:

Q. I say, at the University of Texas, had he been admitted to the University of Texas the previous semester, last fall, who would have taught him Legal Bibliography?

A. He might have been taught by Mr. Hudspeth, or by one or two others who were teaching various sections of [fol. 188] Legal Bibliography.

Q. If he had entered the Negro Law School on March 10th who would have taught him Legal Bibliography?

A. Mr. Hudspeth.

Q. If he had entered the University of Texas Law School for the spring semester who would have taught him Torts?

A. Mr. S. T. Morris.

Q. The same Mr. Morris who would have taught him Torts if he had entered the Negro Law School?

A. That is correct.

Q. Had you assigned these professors to teach first year law students in the University of Texas prior to the establishment of the Negro Law School?

A. Yes.

Q. Had you assigned the professors to teach first year law students at the University of Texas prior to the resolution of the Board of Regents of the University of Texas authorizing you to give courses to the Negro Law School?

A. Yes, sir.

Q. The classes were already in session, were they not?

A. Yes.

Q. What I am getting at; did you assign these professors to teach first year law in the University of Texas Law School, having anything in mind that they might also teach in the Negro Law School, at the time they were assigned.

[fol. 189] A. No, not at the time they were assigned.

Q. Now, on page 260 of Association of American Law Schools Handbook, in addition to the two year requirement for admission to the Association, I would like to take up with you each of the requirements, for the purpose of your opinion as to whether the separate Negro Law School financed in accordance with the plans already made and indicated by Senate Bill 140 could ever meet those requirements, after a two year period.

Let's take up the first one there, listed on page 260: (Reading)

> "It shall be a school not operated as a commercial enterprise, and the compensation of any officer or member of its teaching staff shall not depend on the number of students, nor on the fees received."

Does your Negro Law School meet that requirement?

A. Yes, sir, it does.

Q. At this time?

A. Yes.

Q. Number two, the second requirement. I will ask you to state it briefly, rather than me read the whole requirement. It has to do with entrance requirements, the entire requirements, is that correct?

A. That is right.

[fol. 190] Q. Do you have the same entrance requirements for the Negro Law School that you have for the University of Texas Law School?

A. Yes, that was so provided in our amendment.

Q. Then your entrance requirements meet the standards of the American Association now?

A. They do.

Q. Number three. It must be a school which occupies substantially the full working time of the students, required for work in the school, "shall be considered a full-time school." Does the Negro Law School meet that requirement?

A. Yes, sir, it does. That standard differentiates between full-time and part-time schools, and sets up requirements for each, and the Negro Law School, under the provisions made therefor, met the standard here in regard to full-time schools.

Q. Number four. (Reading)

> "The conferring of its degree shall be conditioned upon the attainment of a grade of scholarship ascertained by examination."

Do you have that same requirement for your Negro Law School at this time?

A. We do.

Q. Number five. That has to do with special students, that no such shall be admitted except under certain condi- [fol. 191] tions listed there. I will ask you if you have that same requirement for the Negro Law School?

A. Well, our requirements at the University of Texas Law School are more stringent, in that they do not admit special students, and they would not be admitted to the Negro Law School.

Q. They would not be admitted to the Negro Law School?

A. That is correct.

Q. They meet that standard; is that correct?

A. That is correct.

Q. In the Negro Law School?

A. That is correct.

Q. Now, the sixth requirement, own a law library of not less than 10,000 volumes with certain specifications as to those volumes. I will ask you if you have ordered 10,000 volumes for a permanent library for the Negro Law School, to meet those requirements?

A. We have ordered a sufficient number and kind of books to meet those requirements.

Q. In addition to that, at this time do you have a library available for this law school in the State Capitol Building within excess of 40,000 volumes of law books?

A. We do.

Q. Number eight provides that a complete individual record of each student must be kept. Do you have the [fol. 192] same requirement as far as the Negro Law School is concerned on the individual record of students?

A. Yes. Did you mean to pass over number seven?

Q. I didn't mean to, but let's pass number seven for the time being, to number eight, individual record of students.

A. Yes, that would be satisfied by the regulations now in effect in the University of Texas Law School and which are adopted by the Negro Law School.

Q. Are those—number nine. (Reading)

> "It shall be a school which possesses reasonably adequate facilities and which is conducted in accordance with those standards and practices generally recognized by member schools as essential to the maintenance of a sound educational policy."

I will ask you if, in your opinion, the Negro Law School meets the requirement laid down here by the American Association for reasonably adequate facilities?

A. Yes.

Q. Now, those are all of the requirements, as I understand them, except number seven, which we have passed. Is that correct, sir?

A. That is correct.

Q. Then, we at this time in the Negro Law School meet the requirements of the American Association of Law Schools except as to two years' running, and number seven, which I will read, as (Reading)

> [fol. 193] "Commencing September 1, 1932, its faculty shall consist of at least four instructors who devote substantially all of their time to the work of the school; and in no case shall the number of full-time instructors be fewer than one for each one hundred students or major fraction thereof."

I will ask you to state whether or not the present Negro Law School, as planned for your first semester, meets those requirements?

A. Well, I believe that technically it does not.

Q. Technically, it does not, because your professors assigned are giving part of their time to another school, the University of Texas, it that right?

A. That is correct.

Q. Does it meet that part of the requirement which is intended to have only full-time professors teaching the students, instead of having lawyers who are practicing part time?

A. I think it certainly does, in substance, and I may add that it is quite frequent in law schools in the east which are near together, for instructors to be instructing at the same time in two schools. That is, instructors from Harvard, Yale or Columbia occasionally spend part of their time in instructing in one of the other schools, and, of course, technically, they would as to any particular school [fol. 194] be part-time, but in substance, of course, they are devoting all of their time to law teaching.

Q. Technically, you do not meet the requirements of four full-time professors, but as a practical matter for the first semester students that attended, as a practical matter, do you furnish them that which the full-time professors would have furnished them?

A. Yes, I believe we do.

Q. As a matter of fact, if the relator had been in the University of Texas Law School classes with a hundred or more in your first class for that spring semester——

A. There were nearly two hundred.

Q. Out at the University of Texas—and these same three instructors at the University teaching them, with the 200 students, in your opinion, or within your knowledge, would the relator have had as much personal attention from the professors and as much time from them as he would from those same three professors teaching in the Negro Law School?

A. Assuming a school of no more than a small number of students?

Q. Yes, sir.

A. In the Negro Law School he would have gotten a great deal more personal attention from the faculty than he would have had he been in the large entering classes in the University of Texas.

[fol. 195] Q. Isn't it a fact that the requirements of full-time professors, at least one to every 100 students, isn't the idea behind that to have the professors available to give care and attention to the individual students?

A. Yes.

Q. And more care and time and attention could have been given to the Negro students, based on not more than 10 students, than in the University of Texas Law School?

A. Yes, that is right. They would have had not only their classes, but office hours in the Negro Law School, and

would have been available much more conveniently than to the students at the University of Texas Law School.

Q. Can you think of any reason why, if a student enters out there, and this school grows, as you testified on cross examination that it might be possible to grow, and with the Legislature furnishing the money Mr. Woodward itemized here today, can you think of any reason why that Negro Law School can not within a period of two years, before anyone can graduate from it, why, that school can not meet all of the requirements of the Association of American Law Schools?

A. No, I see no reason why it should not comply with those requirements very rapidly, since the Legislature has announced that it was providing for a University of the first class, and a law school equivalent to that of the University of Texas, as exactly the same expectation and reliance on [fol. 196] the Legislative assurances are the only things we have to rely on for the continue development and stability of the University of Texas Law School.

Q. Are you acquainted with Lincoln University, and the separate law school operated for Negroes in Lincoln University, in Missouri?

A. I am somewhat acquainted with it. I haven't been there, but when I was on the Executive Committee of the Association of American Law Schools, the Committee had a conference, I believe, with one of the faculty of that school there.

Mr. Durham: We object to that as hearsay.

The Court: He shouldn't testify to hearsay.

A. I am just stating the extent of my acquaintance with it.

The Court: Don't recite anything he said.

By Mr. Daniel:

Q. Lincoln University Law School has met the requirements of the Association, has it not?

A. Yes, sir.

Q. And is it a member of the Association?

A. That is correct.

Q. That is all.

Recross-examination.

Questions by Mr. Nabrit:

Q. Dean McCormick, at the University of Texas School of Law, do you use the case method of teaching and study?

A. Yes.

[fol. 197] Q. Will you state briefly just what that is?

A. Well, it is the method most widely prevailing in American law schools today, where the books used as the basis for study in most courses is a collection of cases designed to illustrate and develop the principles of law in the particular subject.

Q. Now, you testified that the,—in your opinion, the library—Section 6 of Respondents' Exhibit No. 5—that the library at the Negro Law School met those requirements. I would like to read it to you.

A. Did I testify that the library met those requirements?

Q. No, the question was asked you by the Attorney General, does this law school meet the requirements and standards of Section 6, and you answered yes.

A. My recollection of our colloquy is that he asked me if we had ordered the books necessary to meet the requirements.

Q. Yes, but your answer was yes. I am going to read Section 6, and let you answer this way. (Reading)

> "Commencing September 1, 1932, it shall own a law library of not less than 10,000 volumes, which shall be so housed and administered as to be readily available for use by students and faculty. Commencing September 1, 1940, it shall have, in addition to the four instructors specified in Section 7 of this article, a qualified [fol. 198] librarian, whose principal activities are devoted to the development and maintenance of an effective library service."

I would like to ask you, Dean McCormick, did the Negro Law School meet the requirements of Section 6 as read to you on March 10, 1947?

A. Did it then meet the requirements? No, clearly not, and I didn't say it did.

Q. Does it meet the requirements today?

A. No, it does not.

Q. Assuming that in all other respects this Negro Law

School is the equal of the Law School of the University of Texas, for the sake of this question only, would the Negro Law School lose that equality by reason of the fact that it did not have a library as set forth in Section 6.

A. No, I think by no means would it lose the equality. In other words, you might have library facilities equal to that of the University of Texas, but not meeting that standard of ownership. This standard requires that the books be owned and the library of the Negro Law School is not owned by the Negro Law School, but I think that in respect to substantial equality, that matter of ownership is immaterial. The library facilities which are furnished to and are owned as the law school is owned, by the State of Texas, and if they are available to the students, and are equal in [fol. 199] range and quality to the library facilities of the University of Texas Law School, they would be equal, but would not meet this standard.

Q. Then, in your judgment, and as a former President of the Association of American Law Schools, you do not consider that Section 6 of the Association are necessary or are valid?

A. No, I wouldn't say that.

Q. All right, then. Assuming that all of these other factors are equal, is this requirement with respect to a library, if it isn't met, does that not make the Negro Law School less—unequal to that of the University of Texas Law School?

A. No, sir. I think that the compliance with the standards is merely evidence of a qualification, evidence of quality, I would say, but I think you can have substantial equality of facilities quite regardless of the complete compliance with the Association of American Law School regulations, if the substance of the educational facilities are provided. That form of ownership, I think, is not a prerequisite to the equality.

Q. As a former President of the American Association of Law Schools, on what basis did you require law schools being considered by your Association, and as a former member of the Executive Committee and passing on it, what was your reason for requiring the law schools that applied dur- [fol. 200] ing that time for admission to the association, and for accreditment by the Association of American Law Schools to comply with this as a minimum standard, if, in

your opinion, it is not necessary in order to have equality with the University of Texas Law School?

A. Normally, in order to have the books available, you would need to own them, but you may well have a special situation, as I think you do here, where they are fully and completely available, though ownership is not in the school.

Q. Departing from that for just a moment, I understood you to say with respect to Section 7 of Respondents' Exhibit No. 5, where it stated that the faculty shall consist of at least four instructors who devote substantially all of their time, that technically it did not meet it, but it met it, you thought, substantially, by reason of the fact that these men taught at the University of Texas and taught in this law school, and, therefore, were giving all of their time to instruction, and you illustrated it by stating that in the East that goes on frequently.

A. I would say occasionally.

Q. Do you know of any institution in the East where that goes on, and where, outside of the men who do visit from school to school, there are not in each of those schools four other full-time law school teachers?

A. No, there isn't any such.

[fol. 201] Q. Also, the Negro Law School where they have three, I think we probably forgot to point out to you that only three teachers have been assigned. There are not four, if they could be denominated full-time.

A. Of course, the three teachers is limited to the first semester, and the instructions from the Chairman of the Board of Regents were to plan to use all of our faculty, so far as necessary, to maintain a full curriculum for the students who did come during this interim period until four or more full-time professors could be employed for the Negro Law School.

Q. One other question, Dean McCormick. As a Dean of a law school, is it your opinion that three teachers who are teaching a full schedule at the University of Texas, where they are resident instructors, and who are visiting professors, or who teach over at the Negro Law School—I won't use the word "visiting"—who teach those same courses over at the Negro Law School, is it your opinion that they are as available for consultation and for working with the students in the school where they are not residents, as they are at the University of Texas?

A. Well, I think under the plan that we had adopted they

would be more available for a group of the size indicated of Negro students than they would be available to the large sections of 150 or 175 students at the University of Texas. [fol. 202] Q. Where were their offices to be, as you had arranged them?

A. Well, we had planned for them to spend a reasonable time in meeting office hours at the Negro Law School in this reading room and office room, and then they would also have offices at the University of Texas.

Q. Are the offices for the teachers at the University of Texas in the reading room?

A. Well, my office is in part of the library, and I am subject to constant interruptions by people coming in and getting books in my office.

Q. I understand your office, but the teachers; are their offices in the reading room?

A. Well, there is a tier of offices on the first floor that opens up into the reading room on the lower level. Some of them open up—one of them is in part of the library, and the others are divorced from the reading room.

Q. And you have in this law school for Negroes offices equal to those?

A. Well, we don't have separate offices for the three instructors, but there are ample facilities for them to meet office hours in the room called the reading room where the desks are.

Q. But the offices are not equal?

A. No, I would not say they were.

Q. I think you stated, Dean McCormick, that these 10,000 [fol. 203] books have been ordered; is that correct?

A. Well, there are a certain number of that 10,000 that is on hand now, and the balance have been ordered.

Q. How many are on hand?

A. Well, Miss Hargrave can give you the details of that. She is the librarian who compiled the list. I think there are some 1,300 or 1,400 on hand, and about 8,700 for which she has placed an order through the Comptroller to the Board of Control.

Q. Which Comptroller is that, of the University of Texas, or the State?

A. The University of Texas.

Q. That is all—Dean McCormick, what is the name of the Comptroller to whom you refer?

A. Mr. Simmons.

Q. Mr. Simmons?
A. Yes.
Q. Do you know his initials?
A. C. D. Simmons, I believe.
Q. Mr. C. D. Simmons?
A. Yes.
Q. On page 261 of Respondents' Exhibit No. 5, there is this paragraph which I will read, Dean McCormick.
A. I have it before me.
Q. You have it before you?
[fol. 204] A. Yes.
Q. Does this school meet the requirement of that provision, that is, the Negro Law School?
A. Which one, which provision?
Q. The last paragraph on page 261, beginning "No school shall be or remain * * *."
A. Well, that is my understanding, yes.
Q. Here is why I asked you that, Dean McCormick, so that you will know before you answer. If a student enters the Negro Law School which has been set up here, it isn't accredited under the rules of the Association of American Law Schools, if after one year or a semester, or two years, or any period short of graduation, if for any reason he desires to transfer to another school—maybe this one goes out of existence, or maybe he prefers another one, or he may get a scholarship—or if for any reason he wishes to transfer to another school, no school that is a member of the Association of American Law Schools can admit him and give him credit for the work done here. Is that equality with the students of the University of Texas Law School? As a former President of the Association, in your opinion, is that equality?
A. Certainly that privilege of transferring credit would not be available to the students of the Negro Law School until that school had become accredited.
[fol. 205] Q. Don't you consider that a lack of equality, in that he has to remain there or lose all that he has done?
A. No, not in the larger outlines of substantial equality. The transferrence of credits from one school to another is a matter of not very frequent concern to students. I don't suppose we have five percent of our students that have transferred any credits, not to my knowledge.
Q. You would say that the fact that of that five percent, in that five percent, any student in the University of Texas

who wanted to transfer, had the privilege and that right, and under those regulations, since the University of Texas is a member of the Association, could transfer those credits to any other school; whereas, a Negro in this Negro Law School would lose all of the work that he has done.

A. Yes, I would call that a minor and temporary inequality or deviation.

Q. At least, you call it an inequality?

A. One which would disappear as soon as the school had carried out for two years the plan that the Legislature has made for its development.

Mr. Nabrit: Your Honor, I would ask that you strike out the last, about what the Legislature intends to do.

The Court: I think that probably was not germane to the answer.

[fol. 206] A. He asked me about equality and how that bore upon equality, and I thought that was an explanation of what bearing I thought it had upon equality.

By Mr. Nabrit:

Q. Dean McCormick, I wish to show you some pictures purporting to be pictures of the law school for Negroes, of which you are the Dean. I wish you would look at them and see if these are pictures of the building of that law school.

A. I am the Dean of both of them.

Q. Yes. I just want you to now be Dean of this one. (Counsel for relator handed the witness two photographs.) Dean McCormick, do you recognize these as being pictures of the law school for Negroes?

A. I recognize one of them, the small picture of part of the entrance, I wouldn't recognize.

Q. But you do recognize this one?

A. Yes, sir.

Mr. Nabrit: We would like to offer this in evidence.

Said instrument was admitted in evidence as Relator's Exhibit No. 2.

Q. Now, Dean McCormick, would you state so that the Court might see it, and point out where the law school is in that area? (Referring to Relator's Exhibit No. 2.)

A. This doesn't picture any of the interior of the law

school. Just from this view, I don't know where the en-
[fol. 207] trance to the——

Q. It is right here.

A. Where is the step-down?

Q. (Indicating on photograph to the witness).

A. Well, the law school occupies the entire ground floor of which a part of the outer wall is shown here.

Q. And this is a sign of some occupant of some other part?

A. Of the second floor, yes.

Q. The consulting petroleum gas engineer that occupies the second floor or some part of it, is that correct?

A. That is correct, as far as I know.

The Court: I believe, if you will permit, I will ask you to indulge me, and we will resume in the morning. We will resume at 9 o'clock in the morning.

Court was recessed at 4:35 p. m., May 13, 1947, until 9 o'clock a. m., May 14, 1947.

[fol. 208] Morning Session. May 14, 1947. 9:00 A. M.

Charles T. McCormick, having resumed the witness stand, testified further as follows:

Recross-examination. (Continued).

Questions by Mr. Nabrit:

Q. Dean McCormick, I wish to show you two pictures, purporting to be scenes of the building housing the Law School of the University of Texas. I wish you would look at them and see if you can identify them as that building, as the building housing the school?

A. Yes, these are different views of the same building, the law school building on the campus of the University of Texas.

Q. Thank you. We wish to offer those in evidence.

Said instruments were admitted in evidence as Relator's Exhibits Nos. 3 and 4, respectively.

Mr. Nabrit: That is all.

Redirect examination.

Questions by Mr. Daniel:

Q. Dean McCormick, do you at this time have any picture available of the Negro Law School that shows as much of the housing facilities, as broad a view of the building as the picture that has just been introduced here showing the [fol. 209] University of Texas Law School?

A. No, I do not.

Q. The picture that was introduced yesterday, would you state to the Court whether or not that shows the entire building from the outside, of the Negro Law School, like these pictures do of the University of Texas Law School Building?

A. No, the view of the building in which the law school is situated is incomplete.

Q. Now, Dean McCormick, yesterday counsel for relator asked about the credits that would be earned by the relator in the Negro Law School, and whether or not they would be recognized upon a transfer to some other school. I will ask you to—I believe you started to explain your answer there. I will ask you to explain whether or not the credits earned in the Negro Law School in the two years preceding recognition by the American Bar Association, if they would then be subject to transfer to a school recognized by the Association of American Law Schools?

A. Yes, that is provided in the last clause of the rule which appears in the last two lines on page 261, and the top of page 262.

Q. Will you read that for the information of the Court? It has been introduced in evidence here.

A. (Reading)

> "Provided, however, that credit may be given for work taken in another American law school within the [fol. 210] two year period immediately preceding its admission to this Association."

Q. Now, yesterday in showing wherein the Negro Law School had already met all of the requirements except the full-time professors and the two years' time, on the library requirement, I believe you testified that you had ordered the necessary number of books to meet the library re-

quirement of the Association of American Law Schools, is that correct?

A. Well, I had given directions for their ordering. I didn't myself order them.

Q. What about the feature of a full-time librarian. Do you have any arrangements or any plan for the appointment of a full-time librarian at any date in the future?

A. Well——

Mr. Durham: We object to that, Your Honor. It is too speculative, about any date in the future. It wouldn't have any probative force on any issues.

The Court: I believe I will let him answer it, Counselor, for the present. It may not be material. I will let him answer at this time.

Mr. Durham: Note our exception, if Your Honor please.

A. We have the funds available, and have been instructed to secure a full-time librarian, and the necessary additional full-time faculty at such time as the student demand makes [fol. 211] the need for their services apparent, and at such time as the librarian and faculty of the highest caliber, which is what we need, can be secured. That is always a matter of search and negotiation.

Q. I will ask you, have you examined the second and third floors of the building, the Negro Law School Building?

A. Well, I went over yesterday evening after court and tried to get in, but I was unable to do so because the building, the tenants of the two upper floors had left, and those floors were locked.

Q. I will ask you if those floors contain the same floor space, at least as much floor space, as the first floor that you now have rented? I am talking now about the remainder of the building, the second and third floors that Mr. Woodward, the Chairman of the Board, testified he had made arrangements, or had refusal on, for the Negro Law School. I will ask you if those floors each contain at least the same amount of space, if they would furnish suitable space for your permanent library of ten thousand volumes.

Mr. Nabrit: We object your Honor.

Mr. Durham: We object to that because the witness has testified he hasn't seen it.

The Court: I hardly see how he could testify to the space, not having examined it.

Mr. Daniel: I based it on if it had the same floor space, [fol. 212] the same space as the first floor.

The Court: That is an assumption that I expect we had better have verified.

By Mr. Daniel:

Q. I will ask you, Dean McCormick, if you will look it over during the noon hour so that we can talk with you about it.

A. Yes.

Q. That is all.

Recross-examination.

Questions by Mr. Nabrit:

Q. Dean McCormick, you stated, I believe, that the law school was open on March 10th?

A. That is correct.

Q. And I presume that according to your annoucement the facilities and personnel necessary were available; is that correct?

A. That is correct.

Q. You stated just a moment ago that you would get a librarian when a demand was made?

A. No.

Q. I would like to ask you——

A. I didn't—I don't believe that I said that.

Q. You didn't say that?

A. I said that we had instructions to get one as soon as the student demand became apparent and we were able to [fol. 213] secure one of the high quality that we would insist on.

Q. Now, Dean McCormick, on March 10th did you have a librarian for the Negro Law School?

A. Well, we didn't have a separate librarian, but Miss Hargrave, the Librarian of the University of Texas Law School, under my instructions, did the work that was needed to be done by a librarian for a beginning school, in preparing the list of books to be secured, and in preparing the orders for books, and all of the other work that would be necessary to be done by a law librarian at that juncture.

Q. Had you on March 10th secured a full-time librarian for the Negro Law School?

A. No, we had not.

Q. Have you today secured, as of this date, secured a full-time librarian for the Negro Law School?

A. No, we have not.

Q. The section of the standards Association of American Law Schools to which you referred, and from — you read a moment ago about transfer of credits, the acceptance of those credits depends itself upon a prior accreditation by the American Bar Association, does it not?

A. I am not quite certain about that. It—I would think it may well be that if a school makes its compliance so apparent that it is, that the officers of the Association would predict that it would be admitted, I would be inclined to [fol. 214] suppose that this rule would permit the credit to be given before the actual admission into the Association, but I don't know of any ruling on that.

Q. No, and you don't——

A. There is nothing in the wording of the rule to rebut that conclusion.

Q. Thank you. That is all.

Mr. Daniel: That is all, Dean McCormick.

The Court: All right. You may have your seat.

(Witness excused.)

Miss Helen Hargrave, a witness produced by the Respondents, having been by the Court first duly sworn as a witness, testified as follows:

Direct examination.

Questions by Mr. Littleton:

Q. You are Miss Helen Hargrave?

A. Yes.

Q. You are the Librarian at the Law School of the University of Texas?

A. Yes, I am.

Q. How long have you been connected with the library at the Law School?

A. Since 1929.

Q. Do you have any other library connections other than [fol. 215] that at the University proper?

A. I am a member of the Association, American Association of Law Schools—of Law Librarians, and as a member of that association I am a member of the joint committee on cooperation between the Association of American Law Schools and the American Association of Law Librarians.

Q. The—what is the function of that committee?

A. That committee has as part of its duties the obligation to make out the requirements for law school libraries and then to recommend those requirements to the executive board of the Association of American Law Schools.

Q. What degrees, what college degrees do you have?

A. I have an L. L. B. degree, and I have had a course in Law Library Administration at the University of Columbia.

Q. I will ask you if you have had any duties assigned, or any connection with the Negro Law School?

A. Dean McCormick asked me to make out a list of 10,000 volumes that would make an adequate library for that law school.

Q. And you—did you prepare that list?

A. Yes, I prepared the list.

Q. Was your list prepared upon the basis of the requirements of the Association of American Law Schools?

A. Yes, it was.

Q. Do you have a copy of that list with you?

A. Yes, I do.

[fol. 216] Mr. Littleton: We would like to introduce this.

Mr. Durham: We object to the introduction of it as self serving. It serves no purpose. Your Honor, we go right back to our exception. We haven't been apprised of it.

Mr. Littleton: She has been qualified as an expert, Your Honor, has prepared the list on the basis of the requirements, and is a member of the committee that sets those requirements.

The Court: I believe I will give you your bill.

Mr. Durham: Note our exception.

(Said instrument was admitted in evidence as Respondents' Exhibit No. 8.)

By Mr. Littleton:

Q. Have you ever had any other duties assigned to you in connection with this school, or any other instructions?

A. Yes, I made out the list from the original list that was

set, containing the books to be ordered, and that list was sent to Mr. Simmons, the Comptroller of the University.

Q. You prepared another list in addition to this one?

A. Yes.

Q. What was the difference between the two lists?

A. We eliminated all gifts and any duplicates that had gotten into the first list.

Q. And you say that list was sent to Mr. Simmons, the Comptroller of the University?

[fol. 217] A. Yes.

Q. Do you have a copy of that list with you?

A. Yes.

Mr. Littleton: I would like to introduce that as the list that she prepared.

The Court: What is the difference between them?

Mr. Durham: We want to make this additional objection. We object to this as a copy. It isn't the original. Second, it is self-serving.

Mr. Littleton: She has testified, Your Honor, that this is the list prepared for the purpose of requisitioning the books.

The Court: Of course, the very requisition itself, or the one attached to it would be the best evidence.

Mr. Littleton: The requisition will be introduced later.

The Court: I believe we had better wait until that is done.

Mr. Durham: We object to the duplication.

Mr. Littleton: We can introduce it later. That will be all right.

Q. Miss Hargrave, have you had any other duties in connection with the Negro Law School assigned to you?

A. I selected some books that are customarily used by the first—the students in the first year class, and some other [fol. 218] books that I thought might be of some use, and sent them to the Negro Law School.

Q. Have you made any comparison, or have you investigated the make-up of the State, or Supreme Court Library?

A. Yes, I have. The Supreme Court Library has, in accordance with the requirements laid down by the Association of American Law Schools, with few exceptions, all books that meet those requirements.

Q. What exceptions did you find? What difference did you find in comparison of the two libraries?

A. The State Library is not as—doesn't have as many law text books as the law library at the University. It does

not have as many legal periodicals, and the English Law Reports go only to 1932. In those respects it is not as strong —it does not—of course, you can't say it doesn't comply, but in text it is not as strong, and in the latter two it does not entirely comply with the requirements.

Q. Is that the only phase in which the Supreme Court Library of the State Library fails to meet the standards of the Association of American Law Schools?

A. As for as I know, those are the only things that——

Q. You have said that it was short on periodicals. Did you find periodicals in the Supreme Court Library or in the State Library?

A. Yes, there are legal periodicals in that library, but the [fol. 219] requirements of the Association of American Law Schools is for ten sets of legal periodicals with current numbers. I found only half of that many that were kept with current numbers.

Q. You found five sets?

A. Yes.

Q. Do you recall what periodicals those were?

A. Yes, the American Bar Association Journal, the Harvard Law Review, Columbia Law Review, the Texas Law Review, and a long run from Volume 21 on of Yale Law Review, and in the—that is accepted by the Association as a long run in current numbers, and the early numbers are impossible to secure. That is considered a complete law review.

Q. Did you find anything in the Supreme Court or the State Library which you do not have in the Texas University Law Library?

A. Yes, sir; there are some things in that library that we do not have. That is, things in which they are very much stronger than the Law School library.

Q. Can you give us some example of what you found there that they have?

A. Well, the State Law Library is a depository, Government Depository, and, therefore, they automatically receive the reports of all of the administrative bodies of the United States Government, and also, all—and also receive the other [fol. 220] publications that are sent to the superintendents of documents, to the depository library. It is the strongest library in the south on State Session Laws. It has a great many books in other fields that we have very, very few of, and that is the reports of administrative bodies of the State

of Texas. As, for instance, the Attorney General's opinions, and Tax Board opinions of other states, and some of the states have Workmen's Compensation Boards, or their equivalent, and they have those reports, and others of that type.

Q. Now, in the list that you made up pursuant to Dean McCormick's instructions as to the requirements for a requisition of the books needed for the new Negro Law School, did you include the text books and periodicals that are needed to meet the requirements of the Association of American Law Schools?

Mr. Durham: We object to that, Your Honor. The report itself would be the best evidence of what is included.

The Court: I think that would be true.

Mr. Littleton: All right. We will fix it later then.

Q. How many—I will put it this way, Miss Hargrave. Excluding the duplicate sets of books in the Library of the Law School of the University of Texas, how many volumes, approximately, do you have in that library?

A. Approximately between thirty and thirty-five thousand volumes.

Q. All told, you have 65,000?

[fol. 221] A. Approximately 65,000.

Q. How many volumes did you find in the State and Supreme Court Library?

A. With my inspection and the information that I received, there was approximately 42,000.

Q. In making your comparison of the Library of the Law School of the University of Texas, and the State Library down at the Supreme Court, did you make any observations as to the space, between the two libraries, the floor space?

A. The library at the Law School at the University of Texas has a larger floor space, I believe. Yes, a larger floor space than the one at the capitol.

Q. Are the facilities at the State Library equal to the facilities offered at the Library at the University of Texas, that is, from the standpoint of desks and room to study?

A. We have more tables and chairs at the Law Library at the University. We have a great many more people using them.

Q. You have a great many more people using them at the University then from the standpoint——

A. From what I have observed at the State Library, the times I have been there.

Q. Now, as a member of the Library Committee of the American Association of Law Schools, that makes up the requirements, in your opinion, would you say that the library, the State and Supreme Court Library is substan-
[fol. 222] tially equivalent to the Law Library at the University of Texas?

A. Speaking of the two in just that way, they are substantially equivalent. Now, if it is spoken of the two as meeting the requirements of the Association of American Law Schools for the students, the State Law Library is, as I pointed out earlier, it does not have as many texts and it does not have as many legal periodicals, and the English Reports end in 1932.

Q. You have pointed out certain things that the State and Supreme Court Library did have that the Law Library at the University did not have; is that right?

A. Yes.

Q. And on a substantial basis, with these differences that we have mentioned, the library as a whole is substantially equal to that at the University of Texas?

Mr. Durham: We object to that as leading and suggestive.

The Court: It is quite leading.

By Mr. Littleton:

Q. In your opinion, Miss Hargrave, for law school purposes, leaving out—having in mind the differences that we have mentioned, are the two libraries substantially equal?

A. In my opinion, they are substantially equal, with the differences that I have twice pointed out.

Q. Miss Hargrave, in ordering the books for the perma-
[fol. 223] nent library for the Negro Law School, did you order enough of the periodicals, legal periodicals, to meet the requirements of the Association of American Law Schools?

Mr. Durham: We object to that, first, as an opinion and conclusion of the witness as to whether or not it was enough. We submit the further objection that there was a list filed in writing with the Comptroller.

The Court: The list would be the best evidence.

By Mr. Littleton:

Q. Miss Hargrave, I will ask you to refer to the list you made up of the books——

Mr. Durham: Your Honor, I want to ask one question for the purpose of an objection.

The Court: All right.

Mr. Durham: Miss Hargrave, is that the original you filed with the Comptroller, the one that Mr. Littleton has?

A. The reports that were filed with the Comptroller were all mimeographed.

Mr. Durham: Thank you. We object to it.

The Court: That would, of course, be the list that we should have.

A. The mimeographed list?

The Court: Yes.

A. That is the one that was——

Mr. Littleton: Your Honor, we were putting in the two lists. You ruled out the list that she filed with the Comp-
[fol. 224] troller.

The Court: I simply said the one you actually filed was the one that was admissible. We ruled on a copy of something.

Mr. Littleton: This list that she has prepared showing the requirements of the Association of American Law Schools is the one that she showed the overall picture of the library, and we have accounted for the difference in the two lists by the fact that she has some gifts available.

The Court: The only objection is that you are not offering the one she submitted. I think that is correct, the one that the Comptroller has.

By Mr. Littleton:

Q. Is this list that you handed me here, Miss Hargrave, the list that you presented to the Comptroller of the University of Texas for the purchase of the books being ordered for the Negro Law School?

A. This list was sent to the Comptroller, and a list without the price was sent to the Comptroller—a duplicate list run off on the same stencils, but with the price off, was also sent to the Comptroller.

Q. But this list was the one that you prepared for the purpose of making the order?

A. That was originally sent to Mr. Simmons to make the order.

Q. And the difference between the third list you mentioned is the fact that it doesn't have the price or the estimated [fol. 225] price as listed there?

A. The estimated price.

Mr. Durham: Your Honor, we are entitled to our objection. They say they bought ten thousand dollars worth. Now they say they have got three different lists.

The Court: I think the list actually submitted to the Comptroller is the one we should go on.

Mr. Durham: That is our contention.

By Mr. Littleton:

Q. Did you say that list was actually submitted to the Comptroller?

A. Yes.

Mr. Littleton: I might state, Your Honor, that later on it will be shown that this is the list that went with the requisition all the way through.

The Court: I think we had better wait and get that. We had better offer the one that is admissible.

Mr. Littleton: She testified this is the one that was prepared for the purpose of the requisition.

The Court: With certain changes.

By Mr. Littleton:

Q. Miss Hargrave, why was the third list prepared that you mentioned?

A. The third list was prepared to send to dealers, without the price being put on, the estimated prices.

Q. Is the only difference—what is the difference between this list and the third list you mentioned?

[fol. 226] Mr. Durham: We object to that. It is immaterial what the difference was.

The Court: I think that the list that was actually ordered was the one we should inquire about.

Mr. Littleton: I am afraid I don't——

The Court: A list was sent to the Comptroller.

Mr. Littleton: This is it.

The Court: Apparently it *is* isn't, because you have it. That, at best, is a copy of it, is it not?

Mr. Littleton: No, sir; this is not a copy.

The Court: That is the one?

By Mr. Littleton:

Q. Miss Hargrave, did you testify a while ago that all of the lists that you made up for the purpose of making a requisition were mimeographed lists?

A. They were.

Q. And you sent a mimeographed copy to the Comptroller?

A. Yes.

Q. And this is a mimeographed copy?

The Court: Is that the one you sent to the Comptroller?

By Mr. Littleton:

Q. Is this the list that you sent to the Comptroller?

A. Yes, I sent about 30 of them, and that is one of the ones that I sent.

Q. Miss Hargrave, this morning when you were in the court room, where did you get this list?

[fol. 227] A. I had it.

Q. You had this list——

A. No, you gave it to me. After you gave it to me, I had it.

Mr. Littleton: Later on, Your Honor, I will bring out the fact that I secured this from the Comptroller, and we will qualify it right on from there. It is a minor difference? Do you still object?

Mr. Durham: We still object.

By Mr. Littleton:

Q. One more question, Miss Hargrave. On the two lists that—on the second list that you prepared for the purpose of making the requisition, how many books——

Mr. Durham: Just a minute, Mr. Littleton, please. Your Honor, we object. The Court has sustained that.

The Court: Yes. I think we should offer the list.

Mr. Durham: The list itself is the best evidence of what it contains.

The Court: I think that is right.

Mr. Littleton: All right. Pass the witness.

Cross-examination.

Questions by Mr. Marshall:

Q. Miss Hargrave, will you give to the Court the essential difference between a teaching law school library and the type of library that we usually find in State Capitols and court buildings?

A. In a teaching law school library, I think the principal [fol. 228] difference, and I think, probably in addition to what is found in the court library is a larger selection of text books and more legal periodicals.

Q. Is it not also true that in a teaching law school library emphasis is made on the exclusive use of that library by students and faculty as contrasted to a public library?

A. Well, we do not.

Q. Is your—are the majority of the users of your library law school students and faculty, or other people?

A. The majority are law school students.

Q. And faculty?

A. Yes.

Q. And people from other—doing graduate work in the University, do they use it at times?

A. Yes.

Q. Aren't the other people that use it the exception rather than the rule?

A. We have lawyers, as what I might term, fairly frequent visitors. I don't think that we would have more than one or two a day, sometimes not that.

Q. They are usually graduates, aren't they, of the law school?

A. Not always.

Q. Not always?

A. No, sir.

Q. They are people who come to you from Austin? The [fol. 229] University Law School is in Austin?

A. Yes.

Q. It is the same city where the Capitol Library is, is it not?

A. Yes.

Q. Now and then you have visitors who come in for the purpose of looking up law books?

A. Yes.

Q. Do you have sight-seers walking around?

A. Occasionally people come in to look at the class pictures.

Q. Occasionally?

A. Yes, but it isn't a regular thing.

Q. And you do insist that order is kept in that library; it is your duty, is it not?

A. Yes, we have order in the library.

Q. And that it is quiet, is that not correct?

A. Well, as far as we can.

Q. I am trying to get at what you try to do. You try to make it as conducive to study and concentration as possible, do you not?

A. As far as possible, considering the great number of students that we have.

Q. But you do try to do that?

A. Yes.

Q. The American Association of Law Librarians is restricted, is it not, to law librarians in accredited law schools; is that ——

[fol. 230] A. Oh, no.

Q. Do you have any law librarians who are not in accredited schools?

A. Well, I take that back. I am not sure about that. I know we have librarians other than in law schools who are members, and there are non-librarians who are members.

Q. And it is the job of your Association to raise the standard of law librarians, or the law libraries?

A. The Association has done some work in both lines.

Q. And Miss Hargrave, you have assistants at the University of Texas?

A. Yes, I do.

Q. Are they qualified law librarians?

A. One of them is, and the other one, yes, I think would meet the standards.

Q. You have two, and what are the duties of your two assistants? What are the duties of yourself and your assistants in connection with the Law Library at the University of Texas? What duties do you perform? Specifically, I will ask it this way; is a part of your duty the duty of helping the students while they are in the library?

A. Yes, part of the duty is to help the students. We order the books. We see that the work is done to get the books on the shelves, and we see that, as far as possible, the students get the material that they need.

[fol. 231] Q. And when students are in difficulty as to where to find a particular point they need for their class room work, is it not true that either you or your assistants will give them aid in that task?

A. Yes, we try to locate what they need.

Q. And the three of you are trained in just that job, are you not?

A. No, I wouldn't say that. One of the assistants is a graduate of the law school, and so she knows the work. The other assistant is not a law—did not graduate from law school, but she has been working in the library for a few years, and can do that work to some extent.

Q. I guess you know more about yourself. As a matter of fact, you teach Legal Bibliography, don't you?

A. Yes, I do.

Q. So you are in a perfect position to assist any student in how to find the law in books?

A. I can help them to find the law.

Q. And you do that, do you not?

A. Yes.

Q. Now, as a librarian of the school over here on 13th Street, you made provision to be there to help the students to find cases when they wanted to find them?

A. My instructions about that school were to gather together and send out the materials.

[fol. 232] Q. Were you instructed to do anything else concerning that school?

A. No.

Q. As to this State Library here in the State Capitol, is it not true that that library is available to the students at the University of Texas Law School?

A. I believe it is.

Q. For example, have you had any occasion to send them there to find these administrative reports of the U. S. Government that you do not have? Have you ever had occasion to do that, if you remember?

A. I can not recall at this time.

Q. Is it not true that many of the books necessary to comply with the standards of the Association of American Law Schools are now out of print?

A. Oh, I wouldn't say many, no.

Q. Aren't there—aren't most of the top-flight the law review early numbers now out of print?

A. The early number- of the Yale are out of print.

Q. Aren't the early numbers of Harvard also out of print?

A. No, because complete sets of Harvard can be bought from the very beginning.

Q. From the plates. They have the plates still?

A. You can buy them from Harvard University Law Library Association, I believe it is called.

[fol. 233] Q. And aren't some of the English Reports unavailable?

A. I don't know about unavailable. Some of them are out of print, as you call it, but I don't think they are unavailable.

Q. As a matter of fact, Miss Hargrave,

A. Let me explain that.

Q. Go right ahead.

A. Merely to say that a book is out of print in no wise means it is unavailable.

Q. I was ready to get to that. Is it not true that within your Association of Law Librarians that you are—even the finest library in the country—they are constantly writing to each other trying to get books that they don't have, and they are unavailable any place else; isn't that a constant procedure?

A. If the libraries can locate duplicate volumes in some other library for which they can make an adequate exchange, that is sometimes done.

Q. Sometimes done. Now, taking the Law Library at the University of Texas as it now exists, with all of its books, can it be duplicated today?

A. As far as I can recall now, we have nothing in that library that can't be duplicated today.

Q. Nothing at all?

A. So far as I can recall now.

[fol. 234] Q. For example, bearing in mind the recent difficulties we have had with the war and so forth, about how

long would it take you to get your English Reports, as of today?

A. I don't know. It would take a little while until a set came on the market.

Q. Quite a while, could be quite a while?

A. It is unlikely that it would be quite a while, I think, because there are a good many sets in this country, I am sure. So,—even a large set of books like that comes on the market with more or less reasonable frequency.

Q. Well, about how long would it take you to set up a library to equal the one you have at the University of Texas?

A. You mean, if I had enough money?

Q. If your had enough money?

A. Uh——

Q. Just a minute. That is all we are asking.

A. I think I could do it in less than a year.

Q. Less than a year. Now, we get to the other point which you anticipated, approximately how much?

A. How much——

Q. Approximately how much money?

A. Oh, I don't know.

Q. Could you do it for a hundred thousand dollars?

A. It would take me a little while to figure on that. I wouldn't like to give an estimate.

[fol. 235] Q. With 65,000 law books of any description, it would cost more than a hundred thousand dollars, wouldn't it?

A. If you didn't—many of those books in that library we have had as gifts.

Q. We are assuming that we are going to get no gifts, without the gifts, to purchase the library that you have at the University of Texas, of 65,000 volumes of law books, I will ask you this; offhand, there are a few law books that are two and a half, but most of them are around five and six, just in range?

A. That is right.

Q. So that 65,000 books would cost more than——

A. I was mistaken about that. They don't average five dollars.

Q. About what do they average?

A. They average, I would say, about four dollars.

Q. About four. So that if we use that round figure,

65,000 at four, we would go way over a hundred thousand, wouldn't we? Isn't that true, isn't that true, Miss Hargrave?

A. If all of those books were acquired brand new, which would make the newly acquired library—we don't have all of those books new. We never did have all of them new.

Q. I understand that. Where else in this section of the country do we find microfilm reports of the records and briefs in the United States Supreme Court other than at the University of Texas Law School?

[fol. 236] A. I don't know what other law libraries in this section of the country have those.

Q. There are none in the State Capitol Library, are there?

A. Not that I know of.

Q. Now, as to these administrative reports of the United States Government and other publications of the United States Government and the State of Texas, the Session Laws of the several states, is it not true that all State Capitol Libraries usually have those?

A. I would think so. I don't know. That is only an opinion.

Q. Do you need those to teach law?

A. We have a good many of them that make up our library.

Q. You have some, too?

A. Yes.

Q. Those that you don't have, do you need?

A. If we can buy them, we will add them to our present number.

Q. And in the meantime, if you need them, they are available in the State Capitol Library, is that correct?

A. Yes, they are down here in this library.

Q. And are they not just as available to the students at the University of Texas Law School as they would be to the students at the proposed Negro Law School on 13th Street.

A. So far as I know, but I am not——

Q. That is all you can testify. So, that in comparing the two, as a matter of fact, isn't it true that it isn't fair to use [fol. 237] those books that are available to both groups, isn't that true?

Mr. Daniel: Your Honor, that calls for a conclusion of the witness on what is fair.

The Court: I think so.

Mr. Marshall: I withdraw it, sir.

Q. In your estimate of 42,000 volumes at the State Library, it is based on the estimate of the librarian there; you said you obtained it on information?

A. Yes.

Q. Do you know whether or not that 42,000 volumes included these Government reports and administrative board reports and session laws?

A. No, those were not included, I believe. I think they are in addition.

Q. But you are not sure, are you?

A. No, but that is my belief, that they are in addition.

Q. Now, with your testimony that in your library you have between thirty and thirty-five thousand volumes, without duplicates, is it not true that in order to have a library to equal that, you would have to have at least 30,000 volumes of the same caliber?

A. It seems to me that in judging the substantial equality of any library, that you can have a considerable difference—I know you can have a considerable difference in the [fol. 238] various types of books, so long as they comply with the standards of the Association of American Law Schools.

Q. Well, Miss Hargrave, first; may I ask you—those standards are minimum standards, are they not?

A. That is true.

Q. If we forget the standards, then what is used as the basis of comparing equality of law libraries, if we remove the standards of the Association of American Law Schools?

A. I think that it is having available the books that are generally used by anyone connected with the law.

Q. And do you mean by that both faculty and students?

A. Yes.

Q. Do you know the poundage, weight, that is required for the floor of a law school library?

A. No, I do not.

Q. Have you seen this building over here on 13th Street where the law school is to be?

A. I have not been in it, but I have seen the building.

Q. Would you venture to say that second floor could hold 10,000 volumes of law books?

A. I don't know anything about that.

Q. The last two questions, if I understand you—understood your direct examination, there is no question that as to legal periodicals and English Law Reports——

A. From 1932 on——

[fol. 239] Q. I was getting your conclusion. Did you not say as to those two items the State Library did not meet the requirements of the Association of American Law Schools? No question about those two?

A. That is true.

Q. And as to textbooks, to your mind, they needed a few, but you wouldn't pass on that, as such?

A. No, I would have to compare——

Q. So, now, I ask you as of March 10th of this year, and as of the present time, with all of the law books available for the 13th Street school for Negroes in that building, and in the State Capitol Building, all of those books, is it not true that with all of that we do not comply with the minimum standards of the Association of American Law Schools; is that correct?

A. If you assume that that is all the books that there are available,——

Q. I am not—I am merely assuming everything,——

A. —— for that school.

Q. Miss Hargrave, I am only assuming what is in the question. I will get to the next one. My question is, limiting your testimony, and limiting your answer to this question as of March 10th and as of today, is it not true that if you use all of the books in the 13th Street school for Negroes, plus all of the books in the State Library in the [fol. 240] State Capitol, that those two groups of books, taken all together, do not meet the standards of the Association of American Law Schools, is that correct?

A. That is true.

Q. Now, I understand that under the resolution books in your library are to be made available to these students' use, is that correct?

A. Yes, sir, that is correct.

Q. Now, what I want to know is this. Have you done any accrediting for your Association of Law Librarians?

A. No, I have not.

Q. Do you know of any accrediting agency, recognized in the legal field, that uses as the basis for accrediting one school, the law library of another school? Have you ever heard of that?

A. As far as I can remember, that has never come to my attention.

Q. Well, isn't it true that in evaluating law libraries and law schools, you evaluate the law library that is in that school; isn't that correct?

A. Some law school libraries—I would think in general that that is the method that is used.

Q. That is all. Thank you, Miss Hargrave.

Redirect examination.

Questions by Mr. Littleton:

Q. Miss Hargrave, the books that you sent to the Negro [fol. 241] Law School, what kind of books were they?

A. They were, in the main, books that customarily are used by students in the taking of the first year courses in law.

Q. Did they include the textbooks?

A. Yes.

Q. Did they supply the deficiency in textbooks that you have stated existed in the State or Supreme Court Library?

A. Yes, they did.

Q. Do the practicing lawyers of Austin frequently use the library of the University of Texas?

A. Yes, quite a number.

Q. On your trips, on your visits to the State or Supreme Court Library, what conditions have you observed there as to there being a suitable condition for study, the quiet in the place, and the order of its operation?

A. The times that I have been down there, it has seemed to me that there was no more confusion and, in most instances, less confusion, than in the Law Library at the University of Texas, because of the large number of persons using it.

Q. Do you understand that a librarian for a law library is required by the standards of the Association of American Law Schools to have a law degree?

A. That is not necessary.

Q. In your helping the students at the library, does that help and assistance include help and assistance in briefing [fol. 242] the law, or just finding the books?

A. We just find the books and get them for them. If a student has difficulty in determining what book it might be well to use, we occasionally lend a helping hand.

Q. Are you, yourself, constantly present in the library, and available to the students?

A. Not all of the time. I have my teaching duties, and so there are times when I am not available.

Q. Do you have administrative duties?

A. Yes, I do.

Q. Do you understand that the books included in the list which you prepared, those books included on that list which are out of print—I will withdraw it. Do you understand that the books required to meet the standards of the Association of American Law Schools which are out of print are available from dealers and publishers?

A. That is right, yes, they are.

Q. We have mentioned that the Supreme Court Library did not include the English Reports since 1932. Do the law students or do first year law students make any use of those reports?

A. No, they do not, as far as I know.

Q. Have you had any instructions as to supplying any other books for the Negro Law School?

A. Yes, I have. The Law Library at the University of Texas has more than 500, between 500 and 600 surplus [fol. 243] books in good condition that meet the requirements of the Association of American Law Schools that are available for transfer to the new law library, and there have been offered to this school through me, three gifts of between 900 and 950 books.

Q. Are the English Reports since 1932 available to the Negro Law School from the University Law School Library?

A. At any time.

Q. In your library approximately how many students does your library of 65,000 books accom-odate?

A. At the present about 850 students.

Q. How many books would you estimate would be required to accom-odate 15 students, excluding the duplications?

A. I don't see why, excluding duplications, if the books are well selected for the purpose, that it should take many

more than the minimum requirements set down by the Association of American Law Schools.

Q. You have testified that of this 65,000 law books that approximately 30,000 of them are duplications?

A. Yes.

Q. In regard to the microfilm reports you say you have in your library, do you have a "reader" or projector for the use of those reports there?

A. No, I do not.

Q. Do you know whether the State Library has a microfilm projector?

[fol. 244] A. I have been told that it has.

Mr. Durham: We object to that, Your Honor, and ask that it be excluded.

The Court: Only what she knows of her own knowledge.

Mr. Littleton. I think that is all.

Recross-examination.

Questions by Mr. Marshall:

Q. But is it not true, in the bulletin put out by the Law School you mention the fact that the microfilms are available?

A. Yes, they are available to anyone, but we do not have a reader.

Q. Now, Miss Hargrave, you testified that you—first of all, let me ask you this. Why do you have duplicate volumes? Is it not because of the large number of students; isn't that the reason?

A. Yes, we use duplicates to take care of the students.

Q. Now, you testified that with the exception of duplicates, you would need only approximately 10,000 books to teach 15 students; is that correct?

A. I said well selected books for the purpose.

Q. Then may I ask, you as Librarian of the University of Texas, why is it, with your duty to economize under Texas laws, that with the exception of and excluding the duplicates you have between thirty and thirty-five thousand volumes at the University of Texas Law School?

[fol. 245] A. We have 850 students.

Q. As I understood you to say that the duplicates were for the purpose of taking care of additional students; isn't that correct?

A. We have some duplicates, many duplicates to take care of our additional students.

Q. As a matter of fact, Miss Hargrave, isn't it true that—excuse me, did you want to say something else?

A. No.

Q. Isn't it true that excluding the question of duplicates that it would take as many law books in a law library to service one student as it would to service one hundred; isn't that true, excluding duplicates?

A. I do not think so. That is my opinion. Your range of interest might——

Q. For example, you testified that you do not use the English Reports in the first year?

A. No.

Q. Didn't you testify——

A. That wasn't the answer.

Q. What was it, Miss Hargrave?

A. I said that it was very infrequent that first year law students had any use of the English Law Reports from 1932 to date.

Q. Oh, from 1932 to date?

[fol. 246] A. Yes.

Q. Aren't they included in the Legal Bibliography course, for example?

A. As I remember the questions, on that Legal Bibliography course, I don't think that any books in the English Law Reports from 1932 to date were necessary to answer those questions. That is a little time back that I am thinking over, but as I remember——

Q. I will ask you this question. In the course on Contracts, and the course on Torts, aren't there frequent references in footnotes to British Reports and Canadian Reports, frequent?

A. As I remember, those footnotes,—there are references to English Reports.

Q. Isn't it true that they also have references to legal periodicals?

A. Yes, they have references to legal periodicals.

Q. So that in the first year you need both English Reports and Legal periodicals, don't you?

A. I think it might be well to explain——

Q. Go ahead.

A. — that at our law school it is a very rare case when a first year student is ever—is allowed to read an assigned

article in a bound volume of the legal periodicals. We don't have a sufficient number of those legal periodicals [fol. 247] and if an article is assigned the professor notifies me, permission is gotten from the publisher of the law review, and the article is mimeographed in anywhere from 25 to 50 copies in order to make them readily available to the students.

The same process is followed in almost every course in the second year. We don't have quite as many students in that year, and at times we buy the unbound issues of the periodical containing the article so that we will have copies, but we don't think that 350 or 400 students could use one bound periodical.

Q. One more question, Miss Hargrave. In your association with other law school librarians and experience in your organization, the American Association of Law Librarians, do you ever in comparing law libraries of one school with another, as to its worth as a law library, take into consideration the number of students the school has?

A. Have I ever done so.

Q. Have you ever heard that discussed, the number, in comparing it?

A. I have been at a good many, and done work in a good many of these law libraries around the country, and I think that libraries of recognized law schools, that there are certain groups that have—there are a good many who have books that will well take care of the student bodies [fol. 248] that they have in those schools.

Q. I mean, isn't it a fact that in considering the value of a law school library as such in comparison, isn't it true that you consider the books that are in the library as to caliber, time, and being up to date, rather than that we have forty thousand volumes for four people? What I mean is this; isn't it true that the number of students is no measuring rod as to the efficiency of a law school library, isn't that true?

A. Well, I think that that is in connection with my earlier statement that a well selected library is the best criterion.

Q. In other words, the type of books that you have in it; isn't that correct, and not the number of students?

A. I don't see——

Q. Can I get specific? For example, in comparing Harvard's library with the library at the Library of Congress, or Association of the Bar of the City of New York, which

are constantly compared as to which one is the best, isn't the discussion as to what is in those libraries, and not the number of people that use them? Isn't that the criterion that is used?

A. Yes, as far as I know.

Q. So, that on that basis, if we were to compare the library at the University of Texas Law School with the [fol. 249] library to be established, including 10,000 volumes, and forget about the students, isn't it true that the library at the University of Texas is a better library than the one to be established in this law school, isn't that true?

A. At the present time, considering only the books and not considering the use to be made of the books in the two libraries, yes, I think that is true.

Q. Thank you, Miss Hargrave.

Redirect examination.

Questions by Mr. Littleton:

Q. Miss Hargrave, I want to read to you a paragraph from the resolution of the Board of Regents. (Reading)

> "Be it further resolved: That pending receipt and installation of such library, the Dean of the Law School of the University of Texas be, and he is hereby, authorized to supply on a loan basis books from the Law Library of the University of Texas which may be needed in the efficient conduct of the School of Law of the Texas State University for Negroes."

Do you understand that to include the loan of the microfilm reports to the Negro school?

A. Yes, sir, certainly.

Q. Do you understand it to include all other books that may be necessary?

A. I understand it to include all books that may be neces- [fol. 250] sary, or are in any way needed at that school.

Q. You mentioned a moment ago that articles of legal periodicals which were assigned to the first and second year students were mimeographed. Have you sent any of those mimeographed copies to the Negro Law School?

A. Copies of those articles were included in the group of books that were sent to the Negro Law School.

Q. Now, you have said that the Library of Texas includes 65,000 volumes overall, but that excluding duplicates, it

is comprised of approximately thirty to thirty-five thousand. What is the reason for the additional 30,000 of the duplicates? Will you explain that fully, and how it operates?

A. We have two reasons for duplicates. In the textbook field we have to have duplicates so that we figure if 20—from 15 to 25 students will have the use of one copy. In the reports we have duplicate copies so that the reports will be more available for the large number of persons using them. We have acquired a considerable number of duplicates by gift.

Q. Thank you.

The Court: All right. We will recess for a few minutes, please.

(Witness excused.)

(Court was recessed at 10:45 a. m., May 14, 1947, until 11:05 a. m., May 14, 1947, at which time proceedings were resumed as follows:)

[fol. 251] HALL LOGAN, a witness produced by the Respondents, having been by the Court first duly sworn as a witness, testified as follows:

Direct examination.

Questions by Mr. Littleton:

Q. You are Mr. Hall Logan?

A. That is correct.

Q. You are Chairman of the Board of Control of the State of Texas?

A. Yes, sir.

Q. How long have you been with the Board of Control?

A. Since the first of January, 1946.

Q. Have you received any request to purchase any law books, request from the University of Texas to purchase any law books for the Negro Law School?

A. Yes, we have. The request No. U N 1, dated March 3, 1947.

Q. Do you have a copy of that requisition with you?

A. Yes, sir.

Q. Is there a list of law books attached? Does it describe the law books that are to be purchased?

A. Yes, sir.

Q. Itemize them?

A. Yes, sir, there is a 54—I believe it is 54—page description, yes.

Q. Mr. Logan, is that the list that you loaned to me—did [fol. 252] you loan that list to me this morning?

A. Yes, sir.

Q. That is the list that was attached to the requisition when you received it?

A. Yes, sir.

Q. Will you refer to the list and state whether it includes a requisition to purchase legal periodicals?

A. Yes, there are periodicals here on page 11.

Q. Will you read from the list the names of the periodicals?

A. American Bar Association Journal.
California Law Review.
Columbia Law Review.
Cornell Law Review.
Harvard Law Review.
Illinois Law Review.
Iowa Law Review.
Journal of Criminal Law and Criminology, Northwestern University.
Law and Contemporary Problems, Duke University.
Law Library Journal.
Law Library, Indiana University.
Law Quarterly Review, The Carswell Company.
Michigan Law Review.
Minnesota Law Review.
National Bar Journal.
University of Pennsylvania Law Review.
[fol. 253] Texas Bar Journal.
Texas Law Review.
Virginia Law Review.
Yale Law Journal.
Index to Legal Periodicals.
Jones and Chipman, Index to Legal Periodicals.
Digest of Legal Periodicals.
Commerce Clearing House.

I believe that covers the periodicals, at least the way they are headed here.

Q. Now, for the purpose of help to the Reporter, will you state what pages of that list those periodicals are on?

A. They are covered on pages 11, 12, 13, inclusive, of the requisition.

Q. Will you refer again to the list and state whether it includes requisition to purchase English Reports?

A. Yes, it does. Probably I can find the actual purchase order quicker.

Q. Let's stay with the list right now, Mr. Logan.

A. All right, sir. Yes, on page 15, English Legal Material, from the Carswell Company.

Q. How many total volumes of English material are requisitioned?

A. 854.

Q. Now, will you refer again to the list and state whether it shows a total for the number of—a summary and a total [fol. 254] for the number of the books on the list?

A. Yes, the total volumes, 8,727, and the price on that——

Q. No, will you refer to the requisition and state what date you received that at the Board of Control?

A. The requisition was received on March 3, 1947.

Q. Will you state who signed the requisition?

A. It is signed by D. K. Woodward, Jr., Chairman, Board of Regents, the University of Texas.

Q. I believe—will you identify the requisition as to the number?

A. It is UN-1. That is the coding of the Negro University.

Q. Give me the requisition and the list that was attached to it.

A. All right, sir.

Q. I would like to introduce this.

(Said instruments were admitted in evidence as Respondents' Exhibits Nos. 9 and 10, respectively.)

Q. Mr. Logan, have you done anything to comply with the requisition made? What have you done to comply with the requisition, or to purchase the law books requested?

A. Well, upon receiving the requisition, we interviewed a number of representatives of the law book publishers and dealers, clarifying the specifications, and talking to them about the availability of them, and with the University of Texas. A good many of these are out of print, and after going through those discussions, on April 7th we issued the

[fol. 255] bid forms, as we call them, and asked for bids on April 7th, 1947, including the specifications essentially as set out in the duplicate of that.

Q. Do you have a copy of the request for bids and the specifications that you mentioned?

A. Yes, I have. Here is the specifications in detail, comprising the 54 pages, and here is the three page rider of explanation of instructions on the bid, as we issued them to some 35 prospective bidders.

Q. Will you refer to that request for bids and state what date it bears?

A. It bears the date of April 7th, for opening, two weeks, the customary opening period.

Q. What number does it bear?

A. It bears requisition UN-1.

Q. Will you refer to the list which you attached to that request for bids, and state how it compares to the list that you received with the requisition?

A. It is an exact duplicate of the other. The only exception is that when the University gave them to them for the purpose of their encumbering of funds, they put estimated prices on there. When we send it to the bidders, we leave the price off. We don't want to tell them what to charge.

Q. Will you refer to the list and state how many books are included on the list which you attached to your request [fol. 256] for bids?

A. I don't believe it is totaled, but we could examine it and compare it to those for items.

Q. It is your understanding that it includes the same number of books as the list attached to the requisition?

A. That is right.

Q. Will you give me a copy of the request for bids, the specifications, and the list attached to it?

A. Yes.

Mr. Littleton: I would like to introduce this.

(Said instruments were admitted in evidence as Respondents' Exhibits Nos. 11 and 12, respectively.)

Mr. Daniel: To save the record, may I ask counsel if they will agree that it is the same, except for the prices, and not put it in the record.

Mr. Marshall: I think, if Your Honor please, they are identical, and at some future time we can withdraw one of them.

The Court: All right.

By Mr. Littleton:

Q. Mr. Logan, to whom did you send your request for bids on these law books?

A. There is a list of 35 bidders.

Q. I don't think it is necessary to——

A. All of our recognized list that we carry who pay their fee as standard bidders on all types of books, legal books, plus some others that we felt could bid, everybody we could [fol. 257] think of.

Q. Have you received bids on these law books pursuant to the requests made?

A. Yes, we have received 23 bids from 22 separate bidders, one making two bids.

Q. Have you made any awards or placed any purchase orders on the basis of the bids received?

A. Yes, we have placed the purchase orders on all of the new books, plus the English volumes. We have not placed any on second hand to date.

Q. How many volumes, all told, have you placed orders on?

A. 5,702 volumes have been placed to date.

Q. Will you describe the English volumes that you mentioned that you have ordered?

A. These were purchased from the Carswell Company, English Reports, reprint, volumes 1 to 176, good, second hand, 176 volumes.

English Table of Cases, 2 volumes, new cloth—wait, that second item isn't a part of it. The other part of it is English and Empire Digests, subject to prior sale, isn't second hand; 49 volumes. The two total $1,085.00.

Q. On the books that you have ordered, what dates of delivery were generally specified?

A. Shall I just run through them?

Q. I think—do you have some standard date? You can [fol. 258] give it to me approximately.

A. 30 to 60 days, another 30 to 60; 30 to 60; 60; 10 days after receipt of order; 60; 30 to 60; 30 to 60, 30 to 60, 15 days; 30 to 60; 30 to 60; 10 days; 30 to 60; immediate delivery; immediate delivery.

Q. What are the—do your orders show delivery instructions?

A. The delivery instructions, books to be shipped to the Un-versity of Texas Library, Room 11, Main Building, Austin 12, Texas. They all read the same way.

Q. Mr. Logan, you have stated that you have placed that order—orders for 5,700 of the books r. . itioned. You have also stated that there were 8,700 books requisitioned. Can you state why the orders on the remainder of the books of which you—the remainder of the books on which you have received bids have not been purchased?

A. The balance of the books, we understand, will all be second hand, not available as new, because we specified wherever possible to buy new books, and these other three thousand, whatever they are, are going to require a considerable amount of study in order to determine which is the best buy from the State's standpoint. They are—we anticipate, without any question, they will be released within two weeks. We cleared these new ones first. The second hand books are classified as to excellent, whether they are shelf worn, or whether they are good, with further bindings, [fol. 259] and we have to analyze each of those conditions with the price to determine which is the best buy.

Q. You have received bids, however, on all of the books requisitioned?

A. We have.

Q. Pass the witness.

Mr. Marshall: No questions.

The Court: All right, Mr. Logan. You will be excused.

(Witness excused.)

Miss Helen Hargrave, having been recalled as a witness, testified further as follows:

Redirect examination.

Questions by Mr. Littleton:

Q. Miss Hargrave, I show you this purchase requisition, UN-1, dated March 3, 1947, and I show you the list of books attached to that requisition and ask you to look over that list and state whether or not you prepared it?

A. This is the list that I prepared.

Q. Will you refer to the list, Miss Hargrave, and state the total number of volumes included on the list?

A. 8,227.

Q. Miss Hargrave, I show you again the list which you prepared, which meets the requirements of the Association [fol. 260] of American Law Schools, and ask you to refer to the list and state how many volumes are included on that list?

A. There are 10,008 volumes on that list.

Q. So that between the list that you prepared to meet the standards of the Association of American Law Schools and the list that you prepared for the requisition there is a difference of 1,281 books is that correct?

A. That is right.

Q. Will you state why you did not include the 1,281 books on the list which you prepared for requisition?

A. The reason that I did not include them was because that number of books had been offered as gifts to the new law library, or are available for transfer to it, as I qualified them in earlier testimony, to the new library.

Q. Pass the witness.

Mr. Marshall: No questions.

(Witness excused.)

E. J. Mathews, a witness called by the Respondents, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Littleton:

Q. You are Mr. E. J. Mathews?

A. Yes, sir.

[fol. 261] Q. You are the Registrar at the University of Texas?

A. Yes.

Q. How long have you been Registrar?

A. 35 years.

Q. Were you appointed the Registrar of the Negro Law School?

A. Yes, sir.

Q. State the dates that you assigned for registration in that law school?

A. March 10, 1947. That was the first day, but registration was not to be restricted to that one day.

Q. How long did you keep the law school open for registration, Mr. Mathews?

A. Well, we announced a week, but in correspondence we didn't fix any final day.

Q. Did you in your capacity as Registrar notify the relator, Heman Mation Sweatt, of the opening of that law school and the dates of registration?

A. Yes, sir.

Q. How did you notify him?

A. By letter, registered mail.

Q. Do you know the date of that letter?

A. I think it was March 2 or 3; it was a week before.

Mr. Littleton: If Your Honor please, we have served the formal notice for them to produce the original of the letter in Court.

[fol. 262] The Court: All right.

Mr. Durham: That is it.

By Mr. Littleton:

Q. Mr. Mathews, I show you this letter and ask you whether it is the letter that you sent, that you wrote to Heman Marion Sweatt?

A. Yes.

Q. Is that your signature?

A. It is.

Mr. Littleton: I want to introduce the letter.

(Said instrument was admitted in evidence as Respondents' Exhibit No. 13.)

(Mr. Littleton read to the Court Respondents' Exhibit No. 13.)

By Mr. Littleton:

Q. Mr. Mathews have you received any reply from the relator to that letter?

A. No, sir, none at all.

Q. Has the relator presented himself for registration since the mailing of that letter?

A. No, sir.

Q. How many inquiries—have you received any inquiries regarding this school since its establishment?

A. Yes; all told, fourteen. Two of the—twelve of the fourteen came during the first half of March. Two of them came during April, and so I take it they applied more particularly to start next fall, some future time, but there were twelve, rather, eleven letters, and one inquiry in per-
[fol. 263] son that were made during the first half of March.

Q. Did all of these inquiries come from prospective students for the school?

A. Well, I assume they were.

Q. In other words, did the nature of their inquiry indicate to you that they were prospective students?

A. The reading of the letters indicated——

Mr. Durham: Wait, Your Honor.

The Court: Of course, the letters——

Mr. Durham: The letters would be the best evidence.

By Mr. Littleton:

Q. Do you you know whether Henry Doyle inquired concerning the opening of the law school, and registration?

A. He presented himself on March 10th at the Negro Law School. He, with a friend, asked some questions, but he wasn't ready to enroll.

Q. Had he talked with you before that time about his registration?

A. I suppose that would be hearsay testimony. He didn't talk to me, but he talked to——

Mr. Durham: Your Honor, we object to it.

The Court: That is right.

A. — the Assistant Registrar.

Cross-examination.

Questions by Mr. Durham:

Q. Mr. Mathews, I believe you have stated that the re-
[fol. 264] quirements for admission to the University of Texas are identical with the requirements for the admission of a student to the Negro Law School?

A. Yes, sir.

Q. In your letter you referred to the relator's application. When did you first see and examine the relator's

application for admission to the University of Texas School of Law?

A. It was during a period of a conference between some half dozen negro leaders in Texas, held in the President's Office. I believe that was last summer.

Q. The application of the relator was presented to you at that time as Registrar of the University of Texas for admission to the first year law class of the University of Texas School of Law. I believe you examined the application and determined his qualifications for admission?

A. Yes, sir.

Q. Is that the same application that you referred to in paragraph 2 of the letter addressed to the relator on March 3, 1947?

A. Yes.

Q. That was the only application that you had had from the relator, and he possessed the qualifications necessary for admission to the law class, first year law class, in the University of Texas School of Law?

A. The academic qualifications.

[fol. 265] Q. The academic qualifications. Now, I believe the application on the part of the relator for admission to the University of Texas School of Law, first year class, was refused?

A. Yes, sir.

Q. Why was it refused, Mr. Mathews?

A. Because the Constitution of the State of Texas forbids us to accept as students members of the Negro race.

Q. He possessed all other qualifications, except he wasn't a white student?

A. So far as I know, yes; academic qualifications.

Q. And you refused his application for admission to the first year law class of the University of Texas Law School solely on account of race and color?

A. The Constitution of Texas.

Q. I observe, Dr. Mathews, from the letter there that you have got mimeographed,—typewritten form of letterhead. Did you have any printed form of letterhead for the Negro University?

A. Mimeographed.

Q. That is all you had; likewise, for your envelope?

A. Yes, sir.

Mr. Durham: We want to offer the envelope.

(Said instrument was admitted in evidence as Relator's Exhibit No. 5.)

Mr. Durham: That is all, Your Honor.

[fol. 266] Redirect examination.

Questions by Mr. Littleton:

Q. Mr. Mathews, you stated you received some 14 inquiries during the first half of March, and April. Did any of those persons making an inquiry, of those 14 persons, register in the school?

A. No, sir.

(Witness excused.)

(The Court: I suppose, then, we will recess until two o'clock.)

(Court was recessed at 12 o'clock noon, May 14, 1947, until 2 o'clock p. m., May 14, 1947.)

Afternoon Session

May 14, 1947, 2 P. M.

Miss Helen Hargrave, having been recalled as a witness, testified further as follows:

Redirect examination.

Questions by Mr. Littleton:

Q. Miss Hargrave, I want to add one question to the testimony that you gave before lunch. You testified that you had 1,281 books available by gift, and from the Texas University Library. You also testified that the list which you [fol. 267] had made up for requisition from the Board of Control showed 8,727 books. I ask you whether or not the 8,727 books, plus the 1,281 books, as has been shown by you, and listed, is sufficient to satisfy the requirements of the Association of American Law Schools?

A. Yes.

Q. During the lunch recess have you made—did you make an inspection of the building at the law school, the Negro Law School?

A. Yes, I did.

Q. Did you make that inspection—what was the object of that inspection?

A. I wanted to look over the arrangements of the rooms, and to find out about the space so that I could figure how many books could be accom-odated there, law books could be accom-odated there.

Q. From your inspection, will you state whether you found that there was—the building was ample to house a library of more than 10,000 books?

A. Yes, it is.

Q. Pass the witness.

Recross-examination.

Questions by Mr. Marshall:

Q. Miss Hargrave, it is true, is it not, that you couldn't put them in that basement part that is now open for the law school, could you?

[fol. 268] A. No.

Q. Did you see the ground floor that you go down five steps to get to there, that floor?

A. Yes.

Q. You couldn't put that on that floor, could you?

A. With the other things moved out, there could be put, as I figure, in those rooms, approximately 7,000 books. That leaves the stacks with adequate aisle space between.

Q. Would there be any other space left down there after that?

A. No, that would take the space on the ground floor for the books.

Q. Is it possible on the ground floor to have a library and law school at the same time?

A. Not of the size library that has been ordered and acquired for the law school.

Q. What I should have included, Miss Hargrave; is it possible to have a library sufficient in size to meet the standards of the Association of American Law Schools and class rooms and library space and office space; is it possible to have all of that on that first floor?

A. No, it is not.
Q. No way it could be done?
A. No, it would not be possible on the first floor.
Q. That is all.

Redirect examination.

Questions by Mr. Littleton:

Q. When you made your inspection at lunch, Miss Har-
[fol. 269] grave, you inspected the whole building?

Mr. Durham: We object to that. The evidence shows the State didn't have the whole building at that time, and doesn't have it now, and that certainly is going outside of the pleadings, and outside of this case on a speculative proposition.

Mr. Littleton: The evidence shows that arrangements have been made for the acquisition of the entire building.

The Court: But as I understand, you allege that you have sufficient space to——

Mr. Littleton: Your Honor, I am showing how much housing facilities it would take to house the library.

Mr. Durham: We don't object to him showing how much it would take to accom-odate this school.

The Court: Yes.

By Mr. Littleton:

Q. When you made your inspection at noon, Miss Hargrave, did you compute—did you examine the entire three floors of the building?
A. Yes, I did.

Mr. Durham: Your Honor, we object to it. It is immaterial. It isn't in issue in this case.

The Court: I am going to hear it, but I am bearing in mind it is just what it might take to put that many books in.

Mr. Durham: If that is the purpose, it is different, Your
[fol. 270] Honor.

By Mr. Littleton:

Q. Did you find the three floors of this building substantially of the same area?
A. Yes, I did.

Q. Would you say that a library of 10,000 volumes, sufficient to meet the requirements of the Association of American Law Schools could be housed in an area of that size?

A. Yes, it could be.

Q. Would that leave an area of that size, and housing a library of that size, would that leave sufficient space for class rooms?

A. Yes, it would.

The Court: I am considering it for the purpose stated only.

By Mr. Littleton:

Q. Did you make any observations as to the structure of that building?

A. I noticed that it was a brick building.

Q. That is all.

Recross-examination.

Questions by Mr. Marshall:

Q. Did you make any test as to whether or not the second and third floors would hold stacks of law books?

A. I made no tests.

Q. So, you are not in a position to testify, as to whether or not you could put a library on the second and third [fol. 271] floors, are you?

A. I presume in a brick building the walls, solid brick, that the balance of the books could be so arranged around the walls that with the knowledge that I have about that, it would take care of those books.

Q. Do I understand your testimony to be that you would put the books around the walls, and you wouldn't have stacks in the middle of the floor?

A. On the ground floor, no. On the ground floor, it would take the space of the ground floor for stacks, as we usually find them in libraries, in order to handle the approximately 7,000 books that I figured on.

Q. And where would the reading room be—downstairs?

A. No, you couldn't have the reading room downstairs. It would have to be on another floor because the ground floor would be filled with stacks of books.

Q. Miss Hargrave, as a matter of fact, are you familiar with the amount of space in a law school that is needed for

class room instruction, Dean's office, faculty offices? Are you familiar with that, or just in a general way?

A. Just in a general way. I don't know much about that.

Q. So that when you testify that that building is adequate to house all of this, you are testifying just in a general way, are you not?

A. I don't see how it could be much otherwise.

[fol. 272] Q. That is all.

Mr. Littleton: That is all.

The Court: All right.

(Witness Excused.)

CHARLES T. MCCORMICK, having been recalled as a witness, testified further as follows:

Redirect examination.

Questions by Mr. Daniel:

Q. Dean McCormick, during the noon hour, did you inspect the three floors of the building in which the Negro Law School is now housed?

A. Yes, I did.

Q. I will ask you to state whether or not in your opinion the entire building furnishes sufficient space within which to house the number of class rooms, reading room that you now have, and a law library of 10,000 volumes?

Mr. Durham: Your Honor, we make the same objection.

The Court: It will be given the same consideration as I stated before.

A. Assuming a small student body for which those facilities were furnished——

Mr. Durham: Your Honor, we ask that that answer be stricken as not responsive.

The Court: Yes, it really isn't.

[fol. 273] By Mr. Daniel:

Q. Limit it strictly to the question of whether or not it would furnish sufficient room for the same number of class rooms and reading room you now have, plus space for 10,000 volumes of books; I will ask you whether or not

in your opinion that building would furnish such suitable space?

A. By class rooms we now have, you mean on the first floor?

Q. Yes, the same size class rooms?

A. Yes, it would contain all of those facilities.

Q. I will ask you to look at this picture, please. Will you state to the Court what building that pictures?

A. That appears to be a representation of the building at 104 East 13th Street.

Q. Is that a picture of the building which we have referred to as the building which now houses the Negro Law School?

A. Yes, it is.

Mr. Daniel: We would like to offer that.

(Said instrument was admitted in evidence as Respondents' Exhibit No. 14.)

Q. Dean McCormick, I will ask you to look at the picture again, and state, if you know, from what place the picture was taken, looking at the foreground between the place where the camera was and the building?

A. Evidently taken from the Capitol grounds.

Q. From within the Capitol grounds?

A. Yes.

[fol. 274] Q. That is all.

Recross-examination.

Questions by Mr. Nabrit:

Q. Dean McCormick, when you were inspecting the law school at noon hour, did you go through this entrance as indicated by the picture?

A. I don't believe I did. I entered on the second floor and came down through the stairs.

Q. Do you recognize that as the entrance to the law school?

A. Well, there seems to be a corner near by. I assume it is correct. I don't know that I would recognize it if you didn't tell me it was, however.

Q. Can you recognize your sign on the door telling the prospective students to come to your office?

A. The sign is there. I certainly can't recognize it in this picture.

Q. But this appears to you to be a part of the law school?

A. Yes, sir, I judge so.

Mr. Nabrit: We would like to offer this in evidence.

Mr. Daniel: You had better identify what is upside down and otherwise in that picture.

Mr. Nabrit: That is a problem.

(Said instrument was admitted in evidence as Relator's Exhibit No. 6.)

[fol. 275] Q. Dean McCormick, did I understand you to state in reply to the question of the Attorney General that in your opinion, from your inspection of the building, and using all three floors, it would adequately house a law school with the same number of class rooms which you now indicate you have on the first floor, and with library facilities adequate to contain a library with a minimum number of 10,000 volumes?

A. That is right.

Q. Are you an expert on library arrangement?

A. No, I am not.

Q. How did you compute the number of feet of floor space necessary to house the stacks, and on what basis of computation did you determine the number of stacks necessary to house 10,000 volumes, in making your estimation?

A. I really didn't carry it out that far. I just was making a general inspection, and it seemed to me that the building was large enough for that purpose. Miss Hargrave, however, did make the detailed estimates of the number of stacks, and of the space needed, and where the space could be found to put them.

Q. Are you testifying on the basis of Miss Hargrave's estimates, or on the basis of your estimation?

A. Well, I suppose it is really partially both.

Mr. Nabrit: Your Honor, I should like to make a motion to strike out all of the testimony which Dean McCormick has made with reference to the adequacy of this building [fol. 276] to house the law library, in that he says it is not based on his information, and evidently upon that of Miss Hargrave.

The Court: I believe he said partly, didn't he?

Mr. Nabrit: What part is that?
The Court: I wouldn't know.

By Mr. Nabrit:

Q. Dean McCormick, what part of your estimation is yours?

A. Well, I have had some contacts with law school buildings, so that I have a general notion of the size of building appropriate for the small law school, and from that background, and from my inspection, and in the course of that inspection Miss Hargrave and I discussed the particular parts of the building where books could be so stored, and she pointed out to me features, and the availability of space for the books, so that those things are always somewhat of a composite of fact and background and experience and inspection, and what people point out to you and tell you.

Q. Suppose we ask you this, Dean McCormick; taking an average size library stack such as Miss Hargrave indicated to you would be used there, how many volumes of law books would it hold; the average size law library stack?

A. Well, if there is any uniform size for them, I am not aware of it.

Q. Let's take any size that you know of, the size that you [fol. 277] discussed.

A. We didn't discuss any particular size.

Q. From your background and experience with law schools, what size, how many volumes do you know will get on any one stack? Take any stack that you know about from your experience. How many volumes would get on it?

A. I think of a stack as a tier of say, from two to perhaps eight or nine shelves, and I don't know how many books would go in a stack. I don't know of any uniformity as to number.

Q. Take a stack that extends across the width of that room, 8 tiers, steel stacks, purchased by the Dean and the Board of Regents for this Negro Law School, to house these books. How many volumes would one of those stacks hold?

A. You say, a steel stack?

Q. I assume you are going to use steel. I will just say stacks. Maybe you are going to use some other kind.

A. Are you assuming a certain length of it? I don't know the uniform practice as to length of the shelves.

Q. Looking at the space on the ground floor, you estimate that it, together with the other space, would hold 10,000 vol-

umes. I am asking you these questions to find out if you had any part in this estimation, or if it is based on your experience, or of, so far as you- statement is made, it is based simply upon Miss Hargrave's testimony, or her experience, or her information, or is there any knowledge which you [fol. 278] possess, for example, as to the number of feet of space required for a student in a library reading room, or if you know how much floor space is required for an average table in a law school, how much aisle space is required by a standard law school librarian, or is your statement, as a matter of fact, merely a guess?

A. No, I would say it was a general fact from my experience and observation of law schools in general, and my inspection of this one. Now, Miss Hargrave makes that report, and it seems to me that by going over there and looking at the building and seeing whether that report accords in a general way with my knowledge and experience, that I would be able to state that I believe the building would furnish those facilities.

Q. What type of building is that, Dean McCormick, construction?

A. Well, it is a three story building, with brick construction on the outside.

Q. Is it solid brick, semi-brick, brick facing?

A. I could not tell you as to that.

Q. Does it have steel beams and girders?

A. I don't know. I haven't made that close an examination of it, and I don't know very much about construction, any how.

Q. So that you don't know whether it will house the library or not, because you don't know whether the walls and framework will sustain the weight of it? Do you know of [fol. 279] your own knowledge that it will?

A. No, I don't.

Q. That is all.

Redirect examination.

Questions by Mr. Daniel:

Q. Have you, as Dean of the school, discussed with Miss Hargrave if you had the whole building where the majority of the books should be located in the building?

Mr. Durham: Your Honor, we object to their going into anything Miss Hargrave told him, as hearsay.

The Court: Of course, he shouldn't testify from what she told him. I think he might, with consultation relate what conclusion he arrived at.

By Mr. Daniel:

Q. I didn't mean to ask you what she told you. Did you have a consultation with her as to where in that building would be the proper place to put the bulk of the library books?

A. Yes.

Q. And from that consultation, what conclusion did you arrive at as to the floor on which the majority of the books should be placed?

A. Well, I thought probably the ground floor would be the most appropriate place.

Q. There isn't any question about the supports to the ground floor, is there, Dean McCormick?

[fol. 280] A. Well, I would suppose not.

Q. That is all.

Mr. Nabrit: No questions.

The Court: All right.

(Witness excused.)

Mr. Daniel: We would like to call the relator, Heman Marion Sweatt.

Heman Marion Sweatt, Relator, having been called as a witness, and having been by the Court first duly sworn, testified as follows:

Cross-examination.

Questions by Mr. Daniel:

Q. Will you state your name, please?

A. Heman Marion Sweatt.

Q. Are you the relator in this case?

A. I am.

Q. Where do you reside?

A. Houston, Texas.

Q. What business are you in?

A. United States mail service, mail carrier.

Q. How long have you been a mail carrier?

A. Eight years.

Mr. Durham: Your Honor, would you ask the witness to [fol. 281] speak out just a little louder?

The Court: Speak out louder.

A. Eight years.

By Mr. Daniel:

Q. You applied for entrance into the University of Texas on February 26, 1946, is that correct?

A. That is right.

Q. I will ask you if it isn't true that on or about March 20, 1946, you were furnished a copy of an opinion by the Attorney General of Texas stating that if you desired and made demand on Prairie View University, that that school was under mandatory duty to furnish you an equal law training with the University of Texas Law School?

A. Yes.

Q. You read that opinion, did you?

A. I did.

Q. Did you make demand or give any notice to Prairie View University, or any of its officers, that you wanted to attend a law course there?

A. I did not.

Q. Did you ever apply to Prairie View University or to any official of that school, or of A. & M. College for a law course?

A. No.

Q. You didn't, then, follow the Attorney General's opinion as to what was the legal procedure by which you were [fol. 282] entitled to an equal law course?

A. No.

Q. You were in this court room on December 17, 1946, at the last hearing of this case, were you not?

A. Yes.

Q. Did you hear the resolution read at that time whereby the Board of Directors of A. & M. College authorized the officials of Prairie View to set up a separate law school in Houston for Negroes?

A. I did.

Q. Then, at that time you knew that such separate law school was proposed for establishment in Houston, Texas, didn't you?

A. I did.

Q. Did you read in the newspapers anything about that law school being set up in Houston?

A. I did.

Q. You did.

A. I did.

Q. You knew, then, that that law school was set up by Prairie View University in Houston, Texas on February 10, 1946, didn't you?

A. I knew some rooms were there.

Q. You knew they were where?

A. In Houston.

Q. In Houston?

[fol. 283] A. That is right.

Q. You knew that they called that the Law School of Prairie View University, didn't you?

A. I knew that they called it that, yes, sir.

Q. Did you go up there for the purpose of registering?

A. I went up there to see it. I didn't go to register.

Q. But you knew where the location was, didn't you?

A. Yes.

Q. Before the date of registration, February 10th?

A. Yes, sir.

Q. And you knew the date of registration was February 10, 1946, didn't you?

A. Yes.

Q. Did you talk with any of the men who were employed to operate the law school?

A. No, I didn't.

Q. Did you check into the qualifications of the lawyer who had been employed to teach law in that school?

A. Yes.

Q. You checked into his qualifications?

A. Yes.

Q. Were you doing that for the purpose of determining whether or not you would attend the school?

A. No.

Q. When did you make up your mind that you wouldn't [fol. 284] go to that school?

A. After talking with my attorney.

Q. Which of your attorneys?

A. Mr. W. J. Durham.

Q. Did you talk with any other of your attorneys?

A. No, I did not.

Q. Did you have Mr. Marshall, attorney for the National Association for Advancement of Colored People, as one of your attorneys at that time?

A. December 17th?

Q. Right.

A. I didn't have—I never have had Mr. Marshall as my attorney. I have not.

Q. You have not?

A. That is right.

Q. You know Mr. Marshall, sitting right here, do you not?

A. Yes.

Q. You know, of course, having sat through the case, he is participating here in the case and cross examining witnesses?

A. Yes, sir.

Q. He is signing the papers as one of your attorneys of record?

A. Yes.

Q. Didn't you authorize him to do it?

A. I authorized Mr. W. J. Durham to represent me, and in a conference with him, I left it with him to secure what [fol. 285] aid he found it necessary to.

Q. You found it agreeable for him to accept the aid of the attorney for the National Association for the Advancement of Colored People?

A. It is agreeable for him to employ Mr. Marshall.

Q. After talking with your attorney, and before making an inspection of the facilities, you decided you wouldn't go to the school?

A. I decided before talking to them.

Q. After inspecting the school?

A. No, before that.

Q. Did you do that before finding out what kind of facilities there were, and faculty was going to teach in that school?

A. Yes.

Q. Did you check into the courses that were going to be offered in that school?

A. No, I did not.

Q. Did you register in that Prarie View Law School at Houston?

A. No, I did not.

Q. About how far is the school from your home in Houston?

A. I would estimate it as being two and a half or three miles.

Q. Now, in February of 1947, did you know about a new law school about to be established here in Austin for Negroes?

A. Yes.

Q. You read the newspaper accounts of it, didn't you?

A. Yes.

[fol. 286] Q. You knew Senator Lacy Stewart, who is now deceased, did you?

A. I didn't know him. I knew he was a Senator.

Q. You were acquainted with his Senate Bill 140 pending in the Legislature during the month of February, or read of it in the newspapers?

A. I was familiar with the newspaper reports of it.

Q. You knew the bill proposed to set up a State University for Negroes, and a separate Law School for that University, to be conducted in Austin by the University of Texas Board of Directors, didn't you?

A. Yes.

Q. Did you receive this letter from the Registrar of the Negro Law School that was introduced here this morning?

A. The letter that was shown me, yes, sir; I received it.

Q. That is Respondents' Exhibit No. 13?

A. Yes.

Q. What date did you receive the letter? It is dated March 3d?

A. I think I received it on the 4th or 5th, one.

Q. Upon receipt of that letter did you make any reply to Mr. Mathews, the Registrar?

A. I did not.

Q. Did you go to see Mr. Mathews and talk to him about what he said in the letter about absolutely equal courses being offered here in the law school?

[fol. 287] A. I did not.

Q. Did you go and talk to Dean McCormick to see about what kind of courses would be offered?

A. I did not.

Q. Did you talk to any University of Texas officials to see if you would actually get equivalent instruction in law in this separate law school, the same as if you went to the University of Texas?

A. I did not.

Q. Did you make any investigation of this separate Negro Law School?

A. Yes, I did.

Q. Did you make an investigation before you made up your mind you wouldn't attend it?

A. I made an investigation immediately after receiving the letter.

Q. Didn't you send the letter to Mr. Marshall, the letter that you saw him take out of his brief case, before we introduced it? Didn't you send that to Mr. Marshall?

A. No, I did not.

Q. Who did you send it to?

A. I took it on the train to Mr. W. J. Durham.

Q. When did you make up your mind not to go to the school?

A. When Mr. W. J. Durham told me it wouldn't give me equal law training as the University.

[fol. 288] Q. Is that the same day you took him the letter?

A. Yes.

Q. How soon did you get on the train after you received the letter?

A. The next day.

Q. And you went to Dallas to see your attorney, Mr. Durham?

A. That is right.

Q. After how much consideration of the matter was it before your attorney told you, advised you not to attend the school?

A. I stayed in Dallas for a week.

Q. How long had you been there before your attorney told you that?

A. During the time that I was there, we discussed it at length, while we were there.

Q. The first day you got there you showed him the letter, is that right?

A. That is right.

Q. And that was about what date?

A. I don't remember it by dates. I received the letter either the 4th or the 5th, and I got the train on the 6th.

Q. Then, you were there in Dallas by the 6th or 7th?

A. That is right.

Q. Right?

A. Yes.

Q. And you showed him the letter the first thing, didn't you?

[fol. 289] A. That is right.

Q. And there in that conference of yours he made his decision about what you ought to do?

A. It was several days before he made his decision. He told me definitely after the conference that it would not afford me equal education as could be obtained in the University of Texas.

Q. And you made no personal investigation of the matter yourself, did you?

A. I am not qualified to pass upon the quality of a law school, no.

Q. Did you talk to anybody else about the quality of the law school other than Mr. Durham?

A. I did not.

Q. And how long did you remain in Dallas after the 6th or 7th of March?

A. I was there on—I am telling you I went there around the 6th or 7th, and I remained there probably a week before I came back to Houston.

Q. Then you were there on March 8th when the National Association for the Advancement of Colored People and other organization representatives met to decide whether or not to support or not to support this separate Negro Law School, weren't you?

Mr. Durham: We object to it; first, upon the assumption [fol. 290] that the National Association for Advancement of Colored People met. That is the first assumption. The question assumes that he was there at the meeting. Both assumptions are without any evidence on the matter in the record.

The Court: I think you had better ask him if he was there.

By Mr. Daniel:

Q. Were you in Dallas on March 8th, 1947?

A. I was there.

Q. Are you acquainted with a meeting—do you know anything about a meeting held in Dallas on that date at which this lawsuit was discussed?

A. I know nothing of the meeting.

Q. Did you while you were in Dallas read a report in the Dallas News about what took place in that meeting?

A. I did not.

Mr. Durham: We object to it as being hearsay.

The Court: He says he didn't.

By Mr. Daniel:

Q. You did not. Isn't it true that you knew before the date of registration down here, March 10th, at the new Negro Law School, that certain leaders who were helping you in this case opposed you in this separate law school?

Mr. Durham: We object to that about "certain leaders." There is no evidence in the record. It is purely an assumption.

The Court: He can ask him if he did.

[fol. 291] A. I don't know anything about—I don't know what leaders—I don't know anything about the leaders.

By Mr. Daniel:

Q. Do you know Joseph J. Rhodes, President of the Texas Council of Negro Organizations?

A. Yes, I do.

Q. Did you discuss this law school with him while you were in Dallas?

A. No, I didn't.

Q. Did you hear about the action his organization took against the school while you were in Dallas?

A. No.

Mr. Durham: We object to it as hearsay.

The Court: He says he never heard it.

By Mr. Daniel:

Q. Now, your deposition was taken in this case on June 15, 1946, wasn't it?

A. There was a deposition taken in Houston a little before the first hearing.

Q. Did you state in your deposition at that time, and as you have stated here, your attorney was Mr. Durham, is that right?

A. Yes.

Q. At the time you filed this suit Mr. Marshall wasn't in the case at all representing you, was he?

A. No.

Q. At the time we took your deposition on June 15, 1946, [fol. 292] he was not in the case, was he?

A. No.

Q. You had not known him, and he had not been brought into the case at the time your deposition was taken, had he?

A. Not from me, no.

Q. From anybody else, your attorney or anybody else?

A. Not that I know of.

Q. Isn't it a fact that in your deposition taken on June 15, 1946 that this question was asked to you, and you gave the following answer; this is the question?

"Q. Isn't it a fact that you would not attend the Prairie View University if legal training were provided for you there?"

And didn't you give this answer?

"A. That is not true. I will attend Prairie View University on a first class law school equal to the University of Texas."

Isn't that true?

A. I gave that answer.

Q. At that time, on June 15, 1946, you said that you would have attended a law school at Prairie View University if it was equivalent to that at the University of Texas?

A. If it was equivalent.

Q. In other words, you have no objection to a separate law school for Negroes if it is equivalent?

[fol. 293] A. I will have to answer that question in this way. I don't believe in segregation. I don't believe equality can be given on the basis of segregation. I answered that question, in that it stated that it would be—if it would be given at Prairie View, I still do not believe that segregation will give equal training.

Q. That is exactly the point I am getting at. On June 15, 1946 you were willing to accept segregation and a separate law school at Prairie View if it was on an equal basis, weren't you?

A. Assuming that it would be equal.

Q. That is what I say. Is this your signature to the deposition that was taken on June 15th?

A. That is mine.

Q. Now then, after June 15th, 1946, and after you had sworn in your deposition that you would go to a separate law school if it furnished equal facilities; after that time, Mr. Herbert Marshall—I mean Mr. Thurgood Marshall, Attorney for the National Association for the Advancement of Colored People, came into this case, and has been helping on it since then?

A. After what date?

Q. After your deposition, June 15th, 1946?

A. A good time afterwards, yes, sir.

Q. A good while afterwards?

[fol. 294] A. A good while afterwards.

Q. And after June 15th, 1946, after you swore to that in this deposition, is when you made up your mind you were not for segregation at all?

Mr. Durham: We object to it because it does not represent the facts in that question. The question doesn't ask him about a separate school. The question asked about a school at Prairie View

By Mr. Daniel:

Q. Are you acquainted with Prairie View University?

Mr. Durham: We renew our objection. Nothing has been done about that question and answer. He asked if he didn't take the position on that date that he was for segregation. That isn't represented in that question.

Mr. Daniel: I withdraw the question.

By Mr. Daniel:

Q. You are acquainted with Prairie View University?

A. Yes, sir.

Q. You know that is a separate Negro school, don't you?

A. Yes, it is a separate Negro school.

Q. White people do not go to that school?

A. As far as I know.

Q. You knew at the time you swore to this in your deposition that that was a separate school for Negroes, didn't you?

A. I did.

[fol. 295] Q. And when you said in that deposition that:

"I will attend Prairie View University on a first class law school equal to the University of Texas,"

on June 15th, you knew that was a separate Negro school, didn't you?

A. I did not. A first class law school, in my opinion, a first class law school is where an individual has general contact with people with whom he will work after graduation.

Q. You didn't answer my question. Let's go back to my question. At the time you said you would attend Prairie View University on a first class law school, you knew Prairie View was a separate school for Negroes at that time, didn't you?

A. At that time, but I answered the question on the basis of the establishment of the school.

Q. That is right?

A. That is right.

Q. But at Prairie View?

A. In Prairie View.

Q. You didn't think they were going to establish a school for both whites and Negroes at Prairie View?

A. I didn't know what they were going to do.

Q. Let's see if you didn't know one thing. Didn't you know at that time it would be a separate Negro Law School, if it was at Prairie View?

[fol. 296] A. I did not.

Q. You did not. Anyway, you were willing to go to a law school at Prairie View, if it was equal to that at the University of Texas, weren't you?

A. If it was equal.

Q. And that was June 15, 1946. Now, since that time, June 15, 1946, I will ask you if you have changed your mind about going to a separate law school at Prairie View University, if it was equal to the University of Texas.

Mr. Durham: We object to the portion of it, if he has changed his mind since June 15th, for the reason that the deposition, they haven't offered it, and it isn't the proper assumption.

The Court: He can ask him if he is willing to go now.

By Mr. Daniel:

Q. Will you answer that?

A. Am I willing to go to a separate school at Prairie View?

Q. If it is equal to the University of Texas?

Mr. Marshall: The record shows there is no law school at Prairie View. The evidence shows it.

The Court: It would be hypothetical. Let's see what the last question was.

(The Reporter read to the Court the last question set out above.)

The Court: I sustain the objection to the last one. You can reframe your question.

[fol. 297] Mr. Daniel: Yes, sir.

By Mr. Daniel:

Q. Since June 15, 1946 you have changed your mind about being willing to go to a law school at Prairie View University, even if it was equal to that at the University of Texas, haven't you?

Mr. Marshall: We renew our same objection.

The Court: Ask him if he has changed his mind, first.

By Mr. Daniel:

Q. Have you changed your mind?

A. Yes.

Q. And you changed it after June 15, 1946?

A. No, I changed it after studying the situation after filing the suit, after learning more facts about education.

Q. After you swore that you would attend one on June 15, 1946; isn't that right?

A. That is the date of the deposition?

Q. That is the date of the deposition.

A. After that.

Q. After that date?

A. Yes.

Q. And it was after that date that Mr. Thurgood Marshall of the N. A. A. C. P. came into this case?

Mr. Marshall: I didn't object in the beginning, but I object at this stage to cluttering up the record, and I wish,

if the Court would permit me to take up a case, that is [fol. 298] on all-fours. It is State, ex rel. Bluford vs. Canada, 153 S. W. (2d), page 12.

That is in regard to the Journalism School at the University of Missouri, and that case ruled against the same things we are urging in this case; however, in that case the Attorney General of Missouri put up the same type of smoke screen to the effect that the case wasn't the plaintiff's case, but belonged to a public organization, and to put the case further on all-fours, the organization is the National Association for the Advancement of Colored People, and the Supreme Court, although ruling against us, had this to say.

> "In our view, if appellant has the legal right and actually expects to attend the University, her motives for doing so are immaterial."

On that basis, we object to the continuation of this line of testimony.

The Court: I think he has answered it, as far as we need on it.

Mr. Daniel: If the Court please, I would like to say to the Court that our purpose here is not to show his motive for wanting to attend a law school. Our purpose is to lead up to a connected chain of events motivating him not to attend the separate school that has been offered to him, and, therefore, showing bad faith on the part of the relator.

Mr. Durham: He had a right to change it one minute before ten o'clock on the 10th. That is an individual right, [fol. 299] and the fact that he did change can't be questioned.

The Court: I think he had a right to change his mind.

Mr. Daniel: Yes, sir.

Q. Do you know of any other Negro boys who want to attend the law school?

Mr. Durham: We object to that as being immaterial, irrelevant, and of no probative force.

The Court: I believe I will let him pursue it.

By Mr. Daniel:

Q. Do you know of anyone else of the Negro race wanting to go to a law school?

A. I know some who say they want to go to a law school.

Q. Would you give me the names of those whom you know personally who wanted to attend law school?

A. I read in the paper where there was a Mr. Doyle said he wanted to attend a law school.

Q. Who else do you know, of your own knowledge?

A. That is all.

Q. You know of only yourself and Doyle?

A. That is right.

Q. Has the National Association for the Advancement of Colored People contributed to you, toward the expenses of this lawsuit?

A. Contributed to me?

[fol. 300] A. No.

Q. Have they contributed toward the attorneys here, or any other expenses of this lawsuit?

A. I don't know that they have. They offered, after I had filed the suit, to assist me in it.

Q. Were you in Austin on March 26, 1947, about the time of the last hearing in the Court of Civil Appeals in this case?

A. I was here at the last hearing in the Court of Civil Appeals.

Q. Isn't it true that you attended a meeting here in Austin the night of March 25th, at which Thurgood Marshall, the attorney here, spoke to a group of Negro citizens.

Mr. Durham: We object to that as completely immaterial and not germane to any issue.

The Court: I don't see how it could assist us, Mr. Attorney General.

Mr. Daniel: I want to prove as to what was said and done about that matter about finances for this case, for the purpose of showing that the National Association for the Advancement of Colored People had as much control and management of this case, and what happened in this situation about this law school as he does himself, and that they have the further purpose of following that up with a concerted program to boycott this law school and keep other students out.

Your Honor, we were careful not to bring up the point about no students over there. Only Marion Sweatt, did we, [fol. 301] on direct examination show, as not in that school. The relator on every possible occasion has pointed to the fact that there were no students there, and we feel like we

can show that chain of events, and it is his fault and the people supporting the lawsuit that they don't have students, and that is a material issue in this case.

The Court: Anything he would testify to would be hearsay, wouldn't it? It would be what somebody said, wouldn't it?

Mr. Daniel: No, sir; I believe, Your Honor, that through that I can refresh his memory as to knowledge of money which has been spent in this case by N. A. A. C. P. I am trying to refresh his memory. I am also trying to—I will also try to impeach him in the fact that he said he doesn't know anything about the expenses paid by N. A. A. C. P., and show that he does know about it, and knew about it at this meeting where $20,000.00 was asked for.

Mr. Durham: We don't think he can show it through the newspapers.

Mr. Daniel: I am not asking that.

The Court: He can testify to anything he knows of his own knowledge about this.

By Mr. Daniel:

Q. Isn't it true that at that meeting you attended, isn't it true that at that meeting you attended you heard Mr. Marshall say that this case had already cost $6,000.00, and [fol. 302] that the N. A. A. C. P. was helping finance it.

A. I don't remember.

Mr. Durham: That is immaterial.

The Court: He said he didn't hear it.

By Mr. Daniel:

Q. Did you hear Mr. Marshall tell the crowd you needed to raise $20,000.00 for this lawsuit.

Mr. Durham: That would be hearsay, what the attorney said.

Mr. Durham: It is purely hearsay.

By Mr. Daniel:

Q. Are you paying Mr. Marshall a salary or fee for assisting you in this case?

A. I am not.

Q. The National Association for the Advancement of Colored People is furnishing his services?

A. I don't know.

Q. You don't know how he came into the case?

A. He came into the case—in a conference with Mr. Durham, he said he would get assistance in the case, and how he got it and who is paying him, I don't know.

Q. Do you know whether or not the National Association for the Advancement of Colored People have encouraged this lawsuit, and encouraged people to support it?

Mr. Durham: We object to it.

Mr. Daniel: I asked if he knew.

[fol. 303] Mr. Durham: We object to that as irrelevant and immaterial.

The Court: If it was communicated directly to him, I expect it would be helpful.

A. I don't know.

By Mr. Daniel:

Q. Now, you took a year's study at the University of Michigan, didn't you?

A. That is right.

Q. What year was that?

A. That was the school year of 1937-38.

Q. Did the State of Texas pay anything on that at all?

A. No, they did not.

Q. That was at the University of Michigan?

A. That was at the University of Michigan.

Q. Now, did you on March 10th, 1947, present yourself over here for registration in the new Negro Law School?

A. I did not.

Q. Did you at any time from your trip to the receipt of your original notice and your trip to Dallas to talk it over with your lawyer, did you personally make any—come to Austin and look over this school?

A. No, I did not.

Q. Did you talk with any of the law professors who were going to teach in the school before making up your mind not to go to it?

A. I did not.

[fol. 304] Q. You actually didn't make up your own mind about whether to go to it or not?

A. Sure, I made up my mind. I made up my mind after talking with somebody who could judge a law school. I couldn't do that.

Q. And that was only Mr. Durham?

A. That was only Mr. Durham.

Q. And you took his word that you shouldn't came because it was not equal?

A. I took his word it wouldn't give me the type of law education that I could obtain in the University of Texas.

Q. You want to go to law school at the University of Texas?

A. Yes.

Q. You know for several years there have been appropriations made by the Texas Legislature to send Negro students outside the State of Texas to schools when they wanted to take certain training that is not provided inside Texas?

A. I know that is possible.

Q. You didn't apply for that money?

A. I did not.

Q. You want to go to school in Texas?

A. Yes.

Q. You are not interested in transferring from some law school you are admitted to, to some law school outside of Texas?

A. I want to complete my course in Texas.

[fol. 305] Q. Not interested in transferring outside the State later on, are you?

A. No.

Q. You have finished your A.B. Degree?

A. Yes.

Q. What other degrees?

A. That is the only degree I have finished.

Q. You don't care to take any other courses than law courses?

A. I don't know. I might, after I get in.

Q. At the time you filed the suit, all you wanted was law courses?

A. I don't know what it will take for me to take law. When I went to the University of Michigan, taking Bacteriology, I had to go back and get other courses. I don't know what I will take when I get in the University of Texas.

Q. That is all you have applied for up to this good day, is law, is it not?

A. Yes.

Q. And that is all you want at this time?

A. Yes, that is right.

Q. If this Court should hold that this New Negro Law School gives you substantially equal opportunity to obtain a- education in law, you wouldn't attend it, would you?

Mr. Durham: We object to that.

The Court: It doesn't make any difference to me if he [fol. 306] attends it or not. This Court is concerned only with the facilities. We don't care whether he goes or not.

By Mr. Daniel:

Q. If it is thought that the separate Negro Law School in Austin offers you absolutely equal facilities, you wouldn't attend it, would you?

Mr. Durham: We object. It is a supposition.

The Court: I believe in that case he would have a right to answer if, in his opinion, this school was absolutely equal.

A. It depends upon an assumption that I can not agree with.

Q. If you could agree with it; let's say that, let's say we leave it to other judges, and some judges, somebody who knows about it, found it to be so, and we assume it is so, that the new Negro Law School is absolutely equivalent to the University of Texas Law School, but it is a separate school for Negroes, you wouldn't attend it, would you?

A. I would not.

Q. That is all.

Mr. Durham: We reserve the right to examine him later, Your Honor. No questions.

The Court: All right.

(Witness excused.)

Mr. Daniel: Your Honor, I believe that—I was just thinking, they have some witnesses they are in a hurry to [fol. 307] put on, so I suppose it would be all right for us to stop our testimony, and come back to it later. We won't close.

The Court: That will be all right. We will take a few minutes while you are getting your witnesses lined up.

(Court was recessed at 3:05 p.m., until 3:15 p.m., at which time proceedings were resumed as follows:

DR. ROBERT REDFIELD, a witness produced by the relator, having been by the Court first duly sworn as a witness, testified as follows:

Direct examination.

Questions by Mr. Marshall:

Q. Give the Court your full name, sir.

A. Robert Redfield.

Q. And your present occupation?

A. I am now Professor of Anthropology and Chairman of the Department of that name at the University of Chicago.

Q. Will you review briefly your past qualifications, and your training, and the positions you have held, and the general work you have been doing?

A. After taking a Bachelor's Degree, I went to the University of Chicago Law School and took a degree of J. D. I was admitted to the Bar of the State of Illinois, and two years thereafter returned to academic life, where I re- [fol. 308] ceived training in Anthropology and Sociology, and special work in the problems between the racial and color groups. I received a Doctor's Degree in 1928.

Except for periods when I have been giving instruction at other universities in the United States, I have been employed at the University of Chicago as a teacher, and doing research work, and as an educational administrator.

I have also been in charge of the research program for Carnegie Institute at Washington, and at the present I am in that capacity. Last October I gave up the position of Dean of Social Sciences at Chicago University, a position I held for 12 years.

Q. How long have you been studying in the field of racial differences?

A. About 20 years.

Q. And in that period of time have you considered the question of alleged racial differences in school students?

A. I have considered many aspects of the problem of differences between national groups, including school students.

Q. And have those studies included the comparison of students of both races, studying under the same circumstances?

A. I have followed the literature in that field, as well as,

of course, making my common-sense observations as a teacher and administrator.

Q. Well, Dr. Redfield, as a result of your studies, are you [fol. 308½] in a position to give your opinions on the general subject? I will give you more specific ones later, but I wish on the general subject of, one; the inappropriateness of segregation to the purposes of education, the inappropriateness of segregation in education to the interests of public security end of it, and to the general welfare of the community.

Mr. Daniel: Your Honor, we object because this lawsuit involves only education in law and procedure. We object to any questions or opinion evidence that may be offered as to general surveys, not limited to law schools, which are composed of those who have completed certain preliminary work in other fields, and we object to the testimony that has been called for by this question, to the question, and to any other questions along that line.

Mr. Marshall: May it please the Court, this case has narrowed down to one issue. I think the pleadings did considerable toward the end of narrowing it down. In the first place, in our original petition we claimed that the refusal to admit the relator was in violation of the 14th Amendment, and in all of the pleadings filed by the State of Texas, no question has ever been raised as to the qualifications of relator other than his race or color, so that is out of consideration.

The defense of respondents is summed up in their first supplemental answer, large paragraph 2, small (1) in parenthesis, in this statement.

[fol. 309] I am quoting.

> "The Constitution and laws of the State of Texas require equal protection of law and equal educational opportunities for all qualified persons, but provide for separate educational institutions for white and negro students."

And then follows the allegation that the refusal to admit the relator in this case was not arbitrary at all, and was not in violation of the 14th Amendment, but was in keeping with the segregation statutes of the State of Texas, and in that

way joined issue; and in the second supplemental petition we alleged:

> "In so far as respondents claim to be acting under authority of the Constitution and laws of the State of Texas their continued refusal to admit the relator to the Law School of the University of Texas is nonetheless in direct violation of the 14th Amendment to the Constitution of the United States."

If there can be any doubt as to our position in the case, in the fourth paragraph in the same pleading in the supplemental petition, we state:

> "In so far as the Constitution and laws of Texas relied on by respondents prohibit relator from attending Law School of University of Texas because of his [fol. 310] race and color such constitutional and statutory provisions of the State of Texas as apply to relator are in direct violation of the 14th Amendment to the Constitution of the United States."

So, I think that the lines are drawn in this case, and the direct attack has been made that the statutes requiring segregation, the general statutes which prohibit this relator from attending the University of Texas, we claim are unconstitutional, and we have the right to show their unconstitutionality.

How do we propose to do so? Several ways. Before that, I would like to bring this out. As to whether there is any question as to the validity of segregation in this case, the Attorney General brought it out with the last witness. He deliberately brought it out, according to which, as I understand from his cross examination, the Attorney General believes the relator has changed his position from conforming to the statute to now insisting that segregation was invalid, and it was the Attorney General who asked the last question which puts the validity of the segregation statutes flat in issue in this case.

There are several ways of going about proving the unconstitutionality of statutes. They haven't shown any line of reasoning for the statutes. I imagine they are relying [fol. 311] on the presumption that the statutes are constitutional. If they are relying on that we have a right to put in evidence to show that segregation statutes in the State of

Texas and in any other state, actually when examined, and they have never been examined in any lawsuit that I know of yet, have no line of reasonableness. There is no understandable factual basis for classification by race, and under a long line of decisions by the Supreme Court, not on the question of Negroes, but on the 14th Amendment, all courts agree that if there is no rational basis for the classification, it is flat in the teeth of the 14th Amendment.

The Court: I will let you offer your testimony. I will give you your bill, and I will allow it, at any rate.

Mr. Daniel: Do I understand they will be limited to surveys on law students, or education in general?

The Court: Of course, it is like throwing a rose into a group of flowers. The odor is there. We are presumed to act only upon what is admissible testimony, in the last analysis, anyhow, so I am going to hear it, and if in my opinion it is material and admissible testimony, I will consider it. If it isn't, I will not.

Mr. Marshall: Thank you, sir.

The Court: It will be in the record.

Mr. Daniel: We may have our full bill on it, without re-
[fol. 312] peating our objection?

The Court: That is right, it will follow right through.

Mr. Daniel: Unless there is something else.

The Court: Yes.

By Mr. Marshall:

Q. Dr. Redfield, as to the question of the relationship of segregation to the purposes of education, will you first give us what are the overall acceptable purposes of education as construed by educators in the field? What is the main purpose of public education?

A. No two men, of course, will state this the same way, but I should say that the main purposes of education are to develop in every citizen in accordance with the natural capacities of those citizens, the fullest intellectual and moral qualities, and his most effective participation in the duties of the citizens.

Q. Dr. Redfield, are there any recognizable differences as between Negro and white students on the question of their intellectual capacity?

Mr. Daniel: Your Honor, we object to that. That would be a conclusion on the part of the witness. It covers all

negro students and all white students. It isn't limited to any particular study or subject or even show what it is based on.

The Court: I suppose his qualifications he has testified to [fol. 313] would qualify him to draw his conclusion.

Mr. Marshall: We will follow with what he bases it on.

A. If Your Honor will allow me I will present the answer in that form.

The Court: Yes.

A. We got something of a lesson there. We who have been working in the field in which we began with a rather general presumption among our common educators that inherent differences in intellectual ability of capacity to learn existed between negroes and whites, and have slowly, but I think very convincingly, been compelled to come to the opposite conclusion, in the course of long history, special research in the field.

The general sort of situation, Your Honor, which brings about this opposite conclusion, the conclusion that I may state now, significant differences as to intellectual ability, or as to ability to learn, if any, are probably not present between the two groups. We have been brought to that conclusion, Your Honor, by a series of studies which have this general character.

Samples from the two groups, negroes and whites, are placed in as nearly identical situations as possible, and given the limited tasks to perform, tasks which are understood to be relevant to the intellectual faculties, or the capacity to learn. Then these samples are measured against each other as to the degree and kind of success in performing [fol. 314] these limited tasks. That is a general description of the material which leads to the conclusion I have stated. Perhaps at this point it is sufficient to say that the general conclusion to which I come, and which I think is shared by a very large majority of specialists——

Mr. Daniel: We object to that as hearsay, Your Honor.

The Court: I think so.

A. The conclusion, then, to which I come, is differences in intellectual capacity or inability to learn have not been shown to exist as between negroes and whites, and further, that the results make it very probable that if such differ-

ences are later shown to exist, they will not prove to be significant for any educational policy or practice.

By Mr. Marshall:

Q. As a result of your studies that you have made, the training that you have had in your specialized field over some 20 years, given a similar learning situation, what, if any differences, is there between the accomplishment of a white and a negro student, given a similar learning situation?

A. I understand, if I may say so, a similar learning situation to include a similar degree of preparation?

Q. Yes.

A. Then, I would say that my conclusion is that the one does as well as the other on the average.

Q. Well, in your experience, your studies in this particu- [fol. 315] lar field, what is your opinion as to the effect of segregated education; one, on the student—I will give them all to you, and then you can take them separately—two, on the school, and three, on the community in general. Will you give your opinion?

A. My opinion is that segregation has effects on the student which are unfavorable to the full realization of the objectives of education. First,—for a number of reasons, perhaps. I will try to distinguish.

Speaking first with regard to the student I would say that in the first place it prevents the student from the full, effective and economical coming to understand the nature and capacity of the group from which he is segregated. My comment, therefore, applies to both whites and negroes, and as one of the objectives of education is the full and sympathetic understanding of the principal groups in the system in which the individual is to function as a citizen, this result which I have just stated is unfortunate.

In the second place, I would say that the segregation has an unfortunate effect on the student, which I might now anticipate, since, to my opinion, has an unfortunate effect on the general community, in that it intensifies suspicion and distrust between negroes and the whites, and suspicion and distrust are not favorable conditions either for the acquisition and conduct of an education, or for the discharge of [fol. 316] the duties of a citizen. You asked me, did you not, as to the class, and the community?

Q. The school was the second, and the community was the third.

A. I think I have perhaps indicated the difficulties with reference to the school. The school room situation is, provides less than the complete and natural representation of the full community. That is the general view of educators, or it is my view, I should say. It is my view that education goes forward more favorably if the community of student, scholar and teacher is fairly representative of the total community. Rather, the highly specialized and the development of the suspicion and distrust which the segregated situation brings about is correspondingly unfavorable in the school.

With respect to the general community, I suppose there isn't a great deal to add, but if I am still answering your question, I might say this. In my opinion, segregation acts generally on the total community in an unfavorable way for the general welfare, in that it accentuates imagined differences between negroes and whites. These false assumptions with respect to the existence of those differences are given an appearance of reality by the formal act of physical separation. Furthermore, as the segregation, in my experience, is against the will of the segregated, it produces a very favorable situation for the increase of bad feeling and even conflict, rather than the reverse.

[fol. 317] Q. Dr. Redfield, what has been your personal experience concerning the admission of minority groups to educational facilities to which they had previously been denied admission?

A. Well, as I have indicated, my principal experience has been in connection, in the University of Chicago, and in its related educational institutions. The situation there generally is that no segregation is practiced in any of the educational facilities of the University, neither in the class room nor in the dormitory, or in eating facilities or anywhere else in the educational facilities. While the same city or community in which the University lies is one in which segregation or exclusion is practiced as a matter of custom, but not as a matter of law, in a very wide variety of situations, and facilities open to the general public.

In giving that background, I come to the question of what my experience has been with negroes theretofore denied some educational facilities, and I have had experience with

one or two such situations in the University of Chicago and its affiliated institutions, and that in each of the cases that I can recall the result has been, in my opinion, highly beneficial to education and to the University community.

Q. Were there any ill effects at all?

A. I don't know of any.

Q. Do you know of any good effects?

A. Yes. Perhaps I should mention a case. The students [fol. 318] were denied admission, negro students were discouraged from admittance is perhaps a more accurate statement, to the laboratory school of the University.

They were discouraged admission for a great many years. Then it was made apparent that they would be welcome, and they began to come, and there was an opposition from a minority of the academic community to the step. Many evil consequences were told. None of those consequences took place, but, on the other hand, there was an improvement in the community in that there was a representation of the national community which is favorable to education, and the relations between the white and the negro groups were improved in parent-teacher and endeavor.

Q. Thank you, Doctor.

Mr. Daniel: I want to be sure that my exceptions and objections have gone to the entire testimony.

The Court: Oh, yes.

Cross-examination.

Questions by Mr. Daniel:

Q. Dr. Redfield, how many of those surveys of the reaction of students have been limited to law school students?

A. Are you speaking of surveys which I made personally, or of which I have known?

Q. Which you made personally?

A. I have never made a survey of law school students.

[fol. 319] Q. Is this testimony you have been giving based on surveys you have made, or you have read about?

A. In larger measure, the latter. I have participated.

Q. You have participated in some?

A. Yes.

Q. But the majority of the studies you have been testifying about and upon which your testimony is based, are studies made by other people, and which you have read?

A. That is the nature of science, sir.

Q. Yes. I just want to be sure that is in the record. Somebody may not know that is the nature of the science. Have you yourself made any study of the effect of separate education in law schools?

A. No, sir.

Q. As I understand it, it is your opinion that it is discrimination against the white students to require them to go to a white University here in Texas; is that right?

A. If I understand the meaning of what I said, that isn't what I was attempting to say. I was attempting to describe the consensus in regard to educational objectives in the policy of segregation.

Q. And you applied that to separate white schools, with only white students. You said several times, I believe, in your testimony, I believe you said several times that the same applied to segregation of white students, making them [fol. 320] go to the separate school.

A. I think it is to the advantage of any student to be in a community that is largely representative of the national community.

Q. To that extent, you believe that any state that requires the white students to go into a separate school from the negro students is to that extent a discrimination against the white students?

A. I am not sure the other description was used, but I think it worked both ways.

Q. It worked both ways. You have talked about a gradual change that you have observed. All of your testimony, I believe, indicated a gradual change in the situation you have talked about, and in the conclusion you have reached.

A. With reference to admission of negroes to facilities that had theretofore been denied them?

Q. Yes.

A. The case I had in mind was where there was a period when they were not admitted, and then a period when they were admitted. I don't know how you use the word "gradual."

Q. As I understood, you thought there was some difference between ability to learn——

A. I beg your pardon. You are now asking me with respect to *to* the quality of students, as to this matter of racial difference?

[fol. 321] Q. Yes.

A. I said opinion on the subject has gradually changed.

Q. Isn't that generally due to the fact that the subject matter has gradually changed over a period of years?

A. We are wiser than we were, yes, sir.

Q. Don't you believe that in a community where segregation has been enforced as long as it has in some of our southern localities, that the only way that the ultimate goal that you think is the best can be properly obtained is by a gradual change, instead of forcing it upon the community?

A. If I can answer the question at all, Your Honor, I would like——

The Court: You can explain.

A. I think that all change should not come on any more rapidly than it is consistent with the general welfare.

By Mr. Daniel:

Q. Yes, sir. In other words, you will agree with the other eminent educators in your field, the fields in which you are acquainted, that it is impossible to force the abolition of segregation upon a community that has had it for a long number of years, in successfully obtaining the results that are best?

A. No, I don't agree to that.

Q. Do you think the laws should be changed tomorrow?

A. I think that segregation is a matter of legal regulation. Such a law can be changed quickly.

[fol. 322] Q. Do you think it has anything to do with the social standing in the community?

A. Segregation in itself is a matter of law, and that law can be changed at once, but if you mean the attitude of the people with respect to keeping away from people of another race, then perhaps I have another answer.

Q. I am speaking about desired results for the individual and the community, and for the state.

A. Will you ask your question over again?

Q. With respect to the individual, the state, the community and the schools, do you, in your opinion, believe that an immediate change in segregation will accomplish the results that you have testified as being best in a community where segregation has been enforced and recognized for many years?

A. I think in every community there is some segregation that can be changed at once, and the area of higher education is the most favorable for making the change.

Q. You admit there are areas in which the change can not be made at once?

A. You mean in 24 hours, with more harm than good resulting?

Q. Yes.

A. Certainly.

Q. Or within a year?

A. May I state my opinion again?

Q. Instead of 24 hours, we will say within a year or two. [fol. 323] A. I will put it this way. I think this will satisfy you on that as covering my opinion. I think the steps by which, and the rapidity with which segregation in education can be removed with the benefits to the public welfare will vary with the circumstances.

Q. In other words, the circumstances of the community and how long there has been segregation will have a bearing on it?

A. Yes, sir.

Q. In other words, do you recognize or agree with the school of thought that, regardless of the ultimate objective concerning segregation, that if it is to be changed in southern communities where it has been in effect for many years, if it is to be changed successfully, it must be done over a long period of time, as the people in that community change their ideas on the matter?

A. That contention, I do not think, will be my opinion on the matter scientifically.

Q. Does that represent, scientifically, a school of thought on that, in your science, in the matter?

A. There are some that feel that way.

Q. Yes, sir. You are acquainted with the history of the carpet bagger days in the Civil War?

A. I feel better acquainted with it today, sir, than anybody.

Q. Dr. Redfield, let me get you clearly on that. You are not talking about your own trip down here, are you, to [fol. 324] Texas? You say you are acquainted with it today?

A. It just drifted into my mind.

Q. You recall the carpet baggers, where they packed up and came down here from out of the state. You didn't mean to be talking about your trip down here, did you? You are

the only witness from out of the state that we have had on, so far. You didn't mean to be talking about the trip down here?

A. I am afraid the idea has come into my mind now.

Q. That wasn't what you referred to?

A. It is in my mind now.

Q. Are you acquainted with the history of the carpet bagger days in the south?

A. In a very general way.

Q. You know, do you know, from that history, that the attempt to force the abolition of segregation in the south just didn't work?

A. Yes, of course.

Q. Do you feel like the social attitudes and beliefs of the people in that day had some bearing on whether or not it would work?

A. Oh, yes.

Q. Of both races?

A. Oh, yes.

Q. Are you acquainted with Howard University Law School in Washington?

[fol. 325] A. No, sir, only by reputation.

Q. You know it is a negro law school?

A. Yes.

Q. Have you made any check on the separate Negro Law School as to the kind of educational facilities and equality of opportunities that are offered the students of that school?

A. No.

Q. Would you undertake to testify here, Dr. Redfield, that students attending that separate Law School for Negroes at Howard University do not receive equal educational opportunities in law with those attending a similar white school?

A. In my opinion, deprivation of opportunity to exchange professional and intellectual matters with members of the other major groups in their nation is one of the short-comings of the school.

Q. You have never made any check, though, as to students who have come out of that school, and where that has been a handicap on them, have you?

A. No, I never have.

Q. It is just your idea it is a handicap, without having checked to see whether or not it is?

A. That is right.

Q. Are you acquainted with Lincoln University by reputation, a separate law school for Negroes in Missouri?

A. I have heard of it.

[fol. 326] Q. Have you made any survey of the students educated in that school?

A. I think I have indicated I made no survey of legal education.

Q. You are not prepared to say whether or not those students who received their legal education in that separate law school come out of there handicapped in any respect, as far as their knowledge of the law is concerned, are you?

A. I have the opportunity of transforming a conclusion, and as far as there is validity in that, I can draw a conclusion as far as segregated education is concerned.

Q. I am talking about the individuals who have come out of the separate Negro Law School. Have you made any check to see whether they have received equal educational opportunities with white students of Missouri in the white law school?

A. I have had no occasion to.

Q. Then, you don't know whether there are any disadvantages or not, actually, to those individuals, do you?

A. In the particular case of those individuals?

Q. Yes, sir.

A. By virtue of knowledge I might have of them in par-
[fol. 327] ticular, no.

Q. Do you recognize, Dr. Redfield, that there should be some limit to your theory of abolition of segregation?

A. I think I have indicated a limit.

Q. A limit?

A. Yes, a limit.

Q. What limit do you say there should be, and will still give what you think is necessary from the standpoint of public education?

A. The general welfare would be served by extending non-segregation, at the expense of segregation, and that general limit will be defined in my particular conclusion, as the particular circumstances.

Q. Is it necessary that there be social commingling?

A. I understand that by social commingling is meant communication of students and professor, and intellectual endeavor,—yes.

Q. Is that as far as you think it is necessary to have such commingling to obtain the objectives you think are so necessary?

A. I think that whatever commingling is a natural and proper accessory to the educational endeavor will in the [fol. 328] long run develop to the general welfare.

Q. Do you think it is necessary to have social commingling of the races in order to obtain the things you think are necessary to give, to attain the objective that you say is set for public education?

A. The question is repetitious. I have answered it.

Mr. Durham: If Your Honor please——

The Court: I really believe he has answered it. If you are not quite satisfied, General, you may ask another question.

Mr. Daniel: I am not quite satisfied. I don't want to ask an embarrassing question, but yet,—you have testified—I really want to know—you have testified that you believe certain segregation must be done away with in order to accomplish the best for the school and the community?

A. If you are thinking about intermarriage,—if that is in your mind, I would be delighted to answer.

Q. My mind hadn't gotten quite that far on the subject. [fol. 329] A. I am sorry.

Q. I am simply trying to ask you, since you have testified that a certain amount of doing away with segregation is necessary, I want to know your explanation, or expert opinion, on how far it must be done away with in order to accomplish the best for the individual, the school and the community.

Mr. Marshall: This case is at least limited, and the direct examination is most certainly limited, to education.

The Court: I understood that is what he answered, that only in so far as it was necessary for students to have a mutual exchange of ideas along professional and educational lines.

Mr. Marshall: But this question isn't limited to that.

The Court: I understood he answered as I stated, a good while ago, General.

Mr. Daniel: I have asked how far he thinks that is [fol. 330] necessary.

A. In order to accomplish the educational objective?

Q. Yes.

A. Roughly speaking, in the class rooms and in the natural discussion of educational objectives we have common rooms in our University where the students meet to discuss common educational problems.

Q. What about fraternities? Is it necessary that there be commingling there?

A. In any particular situation, I should think probably not.

Q. You think it is not necessary that they belong to the same social groups?

A. This might not be your case, but I should say probably not.

Q. You feel like a Negro student at a separate school that doesn't have the same fraternities or scholarships as the other school——

A. I was thinking of social fraternities.

Q. Let's limit it to that.

A. That seems relatively unimportant. I could answer it either one way or the other, and I would like to see the particular case to see how I would answer it.

The Court: Are there other questions?

[fol. 331] Mr. Daniel: Yes, sir; just a second, Your Honor.

Q. Doctor, are you acquainted with the Encyclopedia Britannica, the publication by that name?

A. I have a set. I don't look at it very often.

Q. You are from the University of Chicago?

A. Yes.

Q. Is that publication now published under the auspices of that University?

A. Yes, sir; and it badly need- rewriting.

Q. It is published under the auspices of your University?

A. Yes.

Q. Have you read the article therein on education, and segregation of the races in American Schools?

A. If I have, I don't remember it.

Q. You don't remember it. Have you written any articles for the Encyclopedia Britannica?

A. No, we are just beginning a revision of anthropological articles, and it seems there has to be a very drastic change.

Q. Do you know who wrote the articles in the Encyclopedia Britannica on the subject of higher education for Negroes, and segregation?

A. I don't remember such articles.

Q. Do you recognize the Encyclopedia Britannica and the articles on such subjects as an authority in the field?

A. No, I do not.

[fol. 332] Q. You do not?

A. No, sir.

Q. Do you know of some scientists in your field who do recognize those articles?

Mr. Durham: We object to that as being irrelevant and immaterial, what somebody else recognizes.

The Court: That would be his—perhaps not what they recognize, but what they have said about it.

A. I think I could answer that question, and do more justice to the meaning than just with a yes or no answer.

By Mr. Daniel:

Q. Go right ahead.

A. All of the articles you have mentioned in that publication are of extremely uneven merit, so that the men with whom I have talked who have studied it—I haven't studied it—tell me that certain articles are extremely good and other articles are extremely bad. That is about the best I can answer.

Q. I understand you are going to leave, and we may want to know something about that, as an authority. Is that Encyclopedia Britannica, could we here in the Court—could the Court, *in your opinion, consider that as one* of the recognized authorities in the field, if they have an authority on the subject?

A. I don't think you could, for the reason that you might hit on one of the articles that was particularly out of date.

[fol. 333] Q. You haven't read the articles on the subjects we are talking about?

A. If I have, I have forgotten it,—I probably have.

Q. But it is your opinion the Court couldn't accept that as an authority?

A. You might get a bad one. I couldn't say.

Q. Could you give us some of the authorities that you think we would be justified in taking as authorities on the

subject you have testified to us about? Have you written any books on the subject?

A. Not with respect to the American Negro. I have written on the general subject with respect to other racial groups. Franz Boes, Ruth Benedict, Ashely Montague, Otto Kleinberg. Is that enough.

Q. Give us one more.

A. One more. I will make it a good one. Then, Dr. Leslie White.

Q. Do all of these scientists have the same, share your ideas as to segregation?

A. I don't know.

Q. Do you know any scientists who have written books or articles on the American Negro, on segregation, who do not share your ideas?

A. Many of the scientists that study this problem have not written or expressed themselves on the education results of segregation. They are agreed, all that I have men- [fol. 334] tioned, and a great many more on the conclusions which I gave in direct testimony in the first of my remarks with regard to the probability, or the existence of inherent differences in educational capacity, but the application of the conclusion to the school situation concerns a very much smaller group of people, because the group of people concerned with that are educational administrators and the like and many of those people whose names I have given you are not educational administrators.

Q. But on your conclusion as to education, you told me there were authorities in the field who disagreed with your conclusion?

A. I think not.

Q. Maybe I am speaking about the gradual change.

A. I don't know who I could cite for that.

Q. That is all.

Redirect examination.

Questions by Mr. Marshall:

Q. Dr. Redfield, you testified on cross examination that your opinions were based on your own studies, but mostly on other studies that have been made. I want to ask you as to whether or not the studies you are speaking of made by other people were scientific studies or not?

A. They were.

Q. And I want to ask you as to whether or not they were mostly published scientific studies?

[fol. 335] A. They were.

Q. Generally recognized in your field as authorities?

A. Yes, they were.

Q. Do you know of any recognized scientific study that recognizes any inherent racial difference among the races, as to capacity to learn?

A. A man named Portees in Australia published some papers which I have read, on the Australian aborigines, which reach the conclusion that there are inherent differences between the races. I am sure there are other papers that reach a similar conclusion. They are all specific studies, and the conclusions are drawn on differences in achievement in the races, and the case of Portees is one. John Ferguson is publishing one, but there are very, very few that would draw the opposite conclusion to the one that I have stated concerning the inherent difference.

Q. Isn't it true the Australian aborigine is on the bottom of the heap?

A. The important thing is there are different studies, and it has taken them a long period of time to reach the conclusion I have offered.

Q. Isn't it true the majority of scientists in your field are in agreement there is no inherent racial difference?

A. Yes.

Q. Isn't it true that such studies as the Kleinberg study in 1935, and others, are specific factual studies which show that a given fact situation, there is no difference?

[fol. 336] Mr. Daniel: We object to that because it is leading.

The Court: Of course, it is leading.

Mr. Marshall: Your witness.

Recross-examination.

Questions by Mr. Daniel:

Q. Dr. Redfield, in determining the question of changing the laws and regulations in a community concerning segregation, how far, in your opinion, should the community, should the State consider the community attitudes of both of the races concerning the matter?

A. It would depend upon the circumstances. I can make an observation, which I think is a partial answer. I think the effect of having a regulation—I guess I will have to make a speech to answer that.

Q. I don't believe——

A. I have got quite a long——

Q. I don't believe it calls for that. I will ask you this. Do you think the community attitude of both of the races should be considered when you go to see what is best in the way of the field of education for that community?

A. I think so. You understand that the attitudes of the community are complex. Attitudes in the State of Illinois and the State of Texas, I take it, are, one; some white peoplea don't want to be near negroes under certain conditions, and those same white people want equality of education [fol. 337] and other opportunities in America, and there are both kinds of attitude in making the change.

Q. Would you consider the attitude of some Negroes that would rather have segregation themselves, in determining the educational situation?

A. Yes, and you have to consider that Texas, with other Americans, share the view that equality of opportunity is due every man in this country, and they are struggling, as are all of us, to reconcile those attitudes.

Q. You would take those two into consideration before you would arrive at what is best to be done for the individual and the community?

A. Always understanding both kinds of attitudes.

Q. I will ask you, Dr. Redfield, if you have made any check on the relative number, of where the Negroes of this country who hold college degrees, have obtained those degrees? Have you made any study as to the opportunities offered for the Negroes of this country to obtain college degrees?

A. I have read reports on it.

Q. Isn't it true that the figures of 85% of the Negroes of this country who have college degrees received them from southern, separate colleges?

A. I don't remember.

Q. Does that sound about right?

A. When you say it, sir, it does.

[fol. 338] Q. Thank you. Are you a member of the National Association for the Advancement of Colored People?

A. No.
Q. That is all.

(Witness excused.)

Mr. Durham: That is the only one that we have to put on out of order.
Mr. Daniel: I want to call Mr. Durham.

W. J. DURHAM, having been called as a witness by the Respondents, and having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Daniel:

Q. State your name, please.
A. W. J. Durham.
Q. Where do you live, Mr. Durham?
A. Dallas, Texas.
Q. What business are you in?
A. Engaged in the practice of law.
Q. Are you attorney for Heman Marion Sweatt in this case?
A. I am.
Q. You heard him testify concerning the fact that you were his attorney when the suit was filed?
A. I did.
[fol. 339] Q. Was Thurgood Marshall here in the case at that time?
A. No, I wasn't here when he talked to me about it.
Q. You were not in it either?
A. You said was he here. I was in Dallas when he talked to me about it.
Q. You misunderstood my question. Was the attorney here, Thurgood Marshall, the attorney for the National Association for the Advancement of Colored people, helping you in the case at the time you filed it?
A. No, he wasn't.
Q. Was he in the case at the time the deposition of the relator was taken in Houston, Texas, June 15, 1946?
A. I had possibly had communication with him.
Q. You had?

A. Yes.

Q. Had the relator had any communication with him at that time?

A. Not that I know of.

Q. I would like for you to state to the Court what, in the way of finances or legal services, the National Association for the Advancement of Colored People is furnishing in this case?

A. They have furnished the money to pay for the record on appeal.

Q. How much money has the National Association furnished?

A. $100.00 to me, I think it was. No, whatever the record in this case costs. I don't remember just what it was.

[fol. 340] Q. Are they also furnishing the attorney for the Association, Mr. Marshall?

A. That is right.

Q. Were you here at the meeting held here in Austin the night before the case came up in the Court of Civil Appeals?

A. I was not.

Q. What other finances had the N. A. A. C. P. furnished in this case?

A. None, to me.

Q. Do you know of any to anyone else?

A. I don't know, not of my own knowledge.

Q. Did you attend a meeting on March 8, 1947 in Dallas and address that meeting which was considering the question of this lawsuit and higher education for Negroes?

A. I have attended several meetings in Dallas where they discussed higher education for Negroes. As to what date, I don't know, I don't remember at this time.

Q. Were you in Dallas when the relator came up there and showed you the relator from the registrar saying that he would be admitted to the new Negro Law School?

A. I was there. He stayed at my home.

Q. You have heard him testify here as to the discussion and conclusion that was reached there, to the effect that he should not enroll, have you not?

A. I did.

Q. Prior to advising him whether or not he should enroll in the new Negro Law School, I will ask you if you came to [fol. 341] Austin and made any check on the school?

A. I did not.

Q. Did you send anyone down here to make an inspection of the school?

A. I did not.

Q. Did you talk with Dean McCormick or any of the other faculty members assigned to the new Negro Law School to determine whether or not, in your opinion, this new Negro Law School had the equal facilities to those at the University of Texas?

A. Did I talk to any of them?

Q. Any of the officials of the University?

A. I did.

Q. Did you make any investigation whatever of the courses that were to be offered, and the instruction to be offered in this new school, before advising, before you and the relator came to the conclusion that he should not attend?

A. I only read the courses set out in the catalogue.

Q. And those are the same courses offered at the University of Texas?

A. Those are the courses offered at the University of Texas.

Q. That is all of the knowledge of the matter that you had before you and he reached the conclusion he should not enroll in the separate law school?

A. No.

[fol. 342] Q. You say that isn't all of the information you received concerning the courses?

A. The courses, yes. That is the only information I had concerning the courses.

Q. Did you have any other information concerning the professors?

A. I never knew who the professors were.

Q. I see. And that is all of the investigation that you made at that time concerning the facilities of the school, the courses and the professors, before the decision was reached as to what he should do?

A. Well, no.

Q. What other investigation did you make of the facilities, the courses and the professors?

A. I asked a Mr. Maceo Smith to furnish me a report.

Q. You asked Mr. Maceo Smith to furnish you a report on the new Negro Law School?

A. That is right.

Q. Did he furnish you that report?

A. Yes.

Q. Is he connected with the National Association for the Advancement of Colored People?

A. Yes.

Q. What is his official position with that organization?

A. Secretary of the State Conference of Branches, N. A. A. C. P.

Q. State that again.

[fol. 343] A. Secretary of the Texas Conference of Branches of N. A. A. C. P.

Q. Is he here in the court room today?

A. I haven't seen him.

Q. Where does he live?

A. Dallas.

Q. Did you make any investigation other than the one you asked Maceo Smith to make?

A. No.

Q. Did he give you a written report?

A. He gave me a report by telephone.

Q. How long after you asked him for it?

A. Oh, perhaps four or five days.

Q. Perhaps four or five days—did you make—then, was it strictly on the investigation made by Maceo Smith that you arrived at the conclusion that you and the relator agreed upon him——

Mr. Nabrit: We object to that. The basis upon which the attorney advises his client is——

The Court: It is confidential.

A. And I desire to claim it at this time.

By Mr. Daniel:

Q. All right. I will ask no further questions,—before you go, I will ask you one question. Did you make any other investigation yourself of the matter, regardless of what you advised your client? You, yourself, did you [fol. 344] make any other investigation of the matter other than what Maceo Smith——

The Court: You can ask him whether he did or didn't, but not what he did.

A. I made no other investigation.

Cross-examination.

Questions by Mr. Marshall:

Q. When you say the money that was contributed to the record in this case by the N. A. A. C. P., did you mean the National office of the N. A. A. C. P. or the State Conference of Branches?

A. The State Conference of Branches of the N. A. A. C. P. and not the National.

Q. And that conference is composed solely of people in Texas?

A. Around 40,000 negroes and whites.

Q. Both whites and negroes?

A. I want to make this statement. When I said "for the record" in this case, Mr. Sweatt gave me the first $100 to pay the Court costs when I filed this lawsuit. That came directly from Mr. Sweatt.

Q. That is all.

Redirect examination.

Questions by Mr. Daniel:

Q. To refresh your memory on this matter of the meeting of March 8, 1947, I would like for you to look over this [fol. 345] article and see if you can refresh your memory as to that particular meeting I am asking about.

A. This says March 13th.

Q. If you will read on down it says the meeting was on the 8th.

A. I attended a number of meetings. Whether this meeting or not, I don't know.

Q. Look that over and see if that doesn't refresh your memory about attending that particular meeting?

A. Now, I attended two or three meetings where similar actions were taken as the action taken here. Whether it was at this meeting or not, because they hold many meetings that I don't attend.

Q. This meeting reported here was held just before the Negro Law School was to be opened, the week-end before, wasn't it?

A. I don't now.

Mr. Nabrit: Your Honor——

Mr. Daniel: I will withdraw the question.

Q. Did you attend one of those meetings several days before March 10, 1947, at which you made a report to the meeting yourself about the separate Negro Law School that was set up here, and which Mr. Henry Doyle, of Austin, was present, and Joseph Rhodes was present and presided at the meeting?

A. I have never made a report to any meeting at any time anywhere with reference to the Negro Law School, because I knew nothing about it.

[fol. 346] Q. You knew nothing about it. Did you ever attend any meeting at which any report was made concerning the N. A. A. C. P. intending to picket the Negro Law School on March 10, 1947, the date it was to open, in which that was reported?

Mr. Nabrit: Your Honor, that question is entirely irrelevant and it is immaterial.

The Court: I believe it is. I will let counsel answer it, if it—if he wants to.

A. I have never been in a meeting that I can remember where the N. A. A. C. P. took action with reference to picketing the law school.

By Mr. Daniel:

Q. I didn't ask you if they took any action. I said, was any report there made or anything mentioned concerning the proposed picketing of this school?

A. Not while I was in the meeting.

Q. Not while you were in the meeting. How long did you stay?

A. I came into the meeting—the Bar Association meets from ten until eleven, as well as I remember, the last meeting I attended on Saturday morning, and I attended the Dallas County Bar meeting from ten until eleven. I don't know how long the meeting had been in session. I went back to my office, and the office girl told me they called me to come to the auditorium at the Roseland Hall. They wanted me to make a statement for the benefit of those as-

[fol. 347] sembled with reference to the Sweatt case, and I think I got to the meeting around twelve o'clock. The only statement I made in that meeting was with reference to the status of the Sweatt case, and as to other—what other business they transacted before or after I left, shortly

after I made my statement with reference to the Sweatt case——

Q. Picketing wasn't mentioned while you were at the meeting?

A. No, because when I came in I told the girl in the office that I would have only a few minutes, and when I came in, they said, "Come to the front, and we will let you make your statement and go." I made my statement, and I guess I had been in there not more than four or five minutes. As soon as I made my statement I attempted to leave the building, and some two or three fellows I knew stopped me, and I sat and talked to them for maybe five or ten minutes, and I left the meeting, and it occurs to me that the meeting adjourned while I was still there talking to them, but I don't know what discussion took place before I went there.

Q. What was the name of the meeting—the organization?

A. I believe that was the—I am mistaken about the N. A. A. C. P. It was a State Council of Negro Organizations.

Q. Was N. A. A. C. P. a member of that council?

A. As I understand, every organization in Texas, religious, fraternal, social and all other characters, organizations of that nature, are members of that organization. That is my——

[fol. 348] Q. Do you know Henry Doyle, of Austin?

A. Yes.

Q. Did you see him there at the meeting that day?

A. I am not sure whether I knew Henry Doyle on that day. I probably did. My impression is there were some people from Austin.

Q. That was Saturday before May 10, 1947?

A. I can't be exact about the date.

Q. It was before the opening date of the new law school in Austin?

A. My best recollection is that it was, but I wouldn't be positive about it.

Q. I see. Is Maceo Smith a lawyer?

A. No.

Q. He is the man that made you the only report that you received on the law school, is that right?

A. That is right.

Q. He is not a lawyer?

A. That is right.
Q. That is all.

(Witness excused.)

The Court: We will recess until nine o'clock in the morning.

(Court was recessed at 4:30 p. m., May 14, 1947, until 9:00 a. m., May 15, 1947.)

[fol. 349] Morning Session, May 15, 1947. 9:00 A. M.

Earl G. Harrison, a witness produced by the Relator, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Nabrit:

Q. State your name, please.
A. Earl G. Harrison.
Q. And where do you live, Mr. Harrison?
A. Philadelphia, Pennsylvania, 2028 Spruce Street.
Q. What is your occupation?
A. Professor of Law, and Dean at the University of Pennsylvania Law School in Philadelphia.
Q. Dean Harrison, would you please state your educational qualifications?
A. I received my Bachelor of Arts Degree at the University of Pennsylvania in 1920; my Bachelor of Law Degree at the University of Pennsylvania Law School in 1923.
Q. Would you state briefly your professional experience?
A. From 1923 until July 1, 1945, I practiced law in Philadelphia. During a portion of that time I conducted courses at the University of Pennsylvania Law School, principally between 1932 and 1938. I became Dean, full-time Dean, and [fol. 350] Professor of Law on July 1, 1945.
Q. Are you a member of the American Bar Association?
A. Yes, sir, I am; and I am Vice Chairman of the American Bar Association's Committee on Continuing Education of the Bar, a committee which is considering ways and means of post admission education. I might say also that since '39 I have been a Trustee of the University of Penn-

sylvania, and as such, a member of the Board of Trustees of the Law School of the University of Pennsylvania.

Q. Have you ever done any work for the Department of Justice?

A. Yes, I have.

Q. What was the nature of that?

A. Well, in 1940 I directed the first National registration of aliens in the United States; immediately after the outbreak of war I supervised the registration of aliens of enemy nationality. From 1942 to 1944, I served as United States Commissioner of Immigration and Naturalization.

Q. Now, Dean Harrison, I want to ask you a hypothetical question. Based upon the evidence which has been, which has already been offered in this case, and to be offered in this case, and upon the proposition that these facts will be proved that are used in this hypothetical question. Assuming that the proposed Negro Law School in Texas is equal in all other respects to the Law School of the University of Texas, except in respect to the size of the student body, and further [fol. 351] assuming that the proposed Negro Law School has a student body which consists of one student, in your opinion would the Negro Law School offer to that Negro student a legal education equal to that offered to any student at the University of Texas, which has a student body of approximately 800 students, and further in connection with that, would it offer a legal education substantially equivalent to that?

A. In my opinion, it would not.

I have taken into consideration in that answer the facts as have been testified to by Dean McCormick——

Mr. Daniel: Excuse me, sir. We object to anything taken into consideration outside of the hypothetical question.

The Court: Yes, that is right. The answer should be to the question of counsel.

Mr. Durham: Your Honor, he assumed in that question the testimony that had already been introduced.

The Court: I know, but then counsel asked him to assume certain things, and he then in his answer said he was assuming something *something* else. It may have been in the testimony, but it wasn't within the confines of his question.

Mr. Nabrit: All right.

A. I would like to make this additional comment upon the question. In my opinion, it is mistaken, even absurd, to

[fol. 352] speak of any institution that has one student as a law school.

Q. Why?

A. Because the system, the modern system of instruction used in a law school is what is known as the case system, the case method. That is to be contrasted with the former method of the lecture system, in which the professor of law merely sat and lectured to the class, in which case it didn't make much difference how many or how few students there were in the class.

Q. Before you go any further in that, Dean Harrison, I would like for you to include in a discussion of this hypothetical question, in dealing with two propositions, whether this student could get equal education or whether he could get the substantial equivalent to that received by a student of the University of Texas; also, ten students. That is, we want the hypothetical question with one student in the Negro Law School, and we want you to deal with and take ten students at the Negro Law School, both in contrast to the students of the University of Texas, where they have approximately 800 students. Will you tell us something about the case system of study and the reason for your opinion?

A. Before I do that, I want to answer specifically the question supposing a student body of ten students.

Q. Yes.

A. In my opinion, such students still would not get an equal [fol. 353] education, or even one that is substantially equal to that which is received by the students in such an outstanding law school as the University of Texas Law School.

Now, I say that largely for the reason that the system of instruction used today is the case method. I was about to elaborate on that. It is to be contrasted with the lecture system. Also, it is to be contrasted with the so-called textbook system, in which the professors and class would use a textbook, which means the result of study by some other professor or lawyer or judge of the pertinent court decisions in that field. The class would take, therefore, rather predigested material by someone else, and undertake to become familiar with the rules of law that can be taken from court decisions, but a good many years ago a change was effected in the method of legal education, and gave rise to the so-called case system.

That system merely means that the students go to the original sources for their materials, namely, the decisions of the courts, and under that system the professor does very much less talking than he did under the lecture system.

He calls on some member of the class to make a report on a given case which has appeared in the case book, and right at that point, the professor usually calls for comment from the other members of the class, and from there on it is largely a matter of discussion in which the members of the [fol. 354] class participate to a large extent, one commenting on the recital made by the previous; another criticizing his statement, either the facts of the case or the decision arrived at by the Court, and it is first and foremost a class discussion.

Now, I find it very difficult even to contemplate the possibility of legal education under such a system of that being received even slightly adequate, if you have a single student in the class, and more than that, I say the same thing is true where there is a limited group of ten.

The so-called smaller law schools usually average between 50 and 100.

Mr. Daniel: We object to that. He is testifying about something not within his own knowledge, hearsay.

The Court: Yes. I think that isn't within the question. He might know of it, but he was not questioned about it. I will sustain the objection.

By Mr. Nabrit:

Q. So that, Dean Harrison, in your opinion, under the case system of study, it is practically impossible for a single law student to get the best possible training out of a class?

A. That is true. In my opinion, a very important facility of a modern law school consists of one's classmates. In other words, it isn't enough to have a good professor. It is equally essential that there be a well-rounded, a represen- [fol. 355] tative group of students in the class room to participate in the class room discussion which centers around previous decisions of the courts.

Q. Now, Dean Harrison, does the presence of—I will restate that. Is the study of law affected by the presence or absence of upper classmen. By that, I mean this; if a single

law student, studying in a freshman class in a school where there are no other students, in the second and third year classes, is the possibility of that student receiving a sound legal education affected by the absence of these upper classmen?

Mr. Daniel: We object, that calls for a conclusion of the witness, Your Honor. It doesn't even call for opinion testimony.

The Court: I believe he could answer that, Mr. Attorney General.

Mr. Daniel: Note our exception.

A. In my opinion, it would have a very material bearing upon the legal training the student would receive. In other words, work in a law school outside of regular class room hours is exceedingly important, rubbing elbows with the other students in the law school, taking part in small discussion groups, discussion with advanced students, all are very important considerations, equally so, in my opinion, with the actual class room work itself.

By Mr. Nabrit:

Q. Dean Harrison, have you made any studies; are you [fol. 356] acquainted with the results of any scientific studies with respect to the size of law schools?

A. I am.

Q. Would you state your knowledge of these scientific studies or your conclusion which you have reached from your own investigations?

Mr. Daniel: We object to the question, and we would like to know what the studies are.

The Court: He can perhaps relate what the studies are.

A. I am familiar with the studies that have been made by the section on Legal Education of the American Bar Association, with the surveys that have been conducted periodically by the Carnegie Corporation, and by the Russell Sage Foundation.

Q. What has been the result of your studies with respect to the sizes of law classes and their bearing on legal education?

Mr. Daniel: Your Honor——

Mr. Nabrit: If you know?

Mr. Daniel: We object to the testimony concerning these studies. We believe they would be the best evidence here. He is testifying about something he didn't have anything to do with, according to what has been shown so far.

The Court: I think he would have a right to testify, being familiar with the scientific studies.

[fols. 357-367] Mr. Daniel: Note our exception.

A. All of the studies that I have mentioned have considered at one point or another the relative merits of a large, as contrasted with a small student body. Most of these studies have divided the law schools of the country into three groups; the so-called large law schools that have a student body in excess of 1,000. Most of the law schools in the country, it was found in the course of these studies, have a student body ranging from 100 to 500.

There is another substantial body of law schools having a student body less than 100. The studies that have been made have put into the category of so-called smaller law schools those students having a student body of between 50 and 150. Those studies also have indicated that the opportunities for legal education, a thoroughly rounded legal education, are much more limited in the so-called smaller law schools than they are in the larger law schools.

The studies that I have reference to have pointed out in general there are four objectives of law school education. One is, of course, to prepare the practitioner. Second, is to prepare and train law teachers. Third, is to train and prepare men for legal research, and the fourth objective is to train and prepare men and women for public service.

The studies to which I have referred have reached the conclusion that the so-called small law schools are not in a [fol. 368] position to achieve or even to strive for all of those four objectives. They have concluded that the small law schools are not in position really to train men for law teaching or for legal research, and those studies have reached the conclusion that the so-called smaller law schools should, therefore, confine themselves primarily to preparing practitioners, and for preparing men and women for public service.

Q. Dean Harrison, do these studies show the, show whether the smaller law schools have in most cases such things as law reviews, moot court?

A. The studies show that many of the smaller law schools do not have those additional facilities, which, in my opinion, are extremely important. The existence of a law review is not only a great incentive to all students, but if a student is fortunate enough to qualify for a position as editor, it is a tremendous advantage to him, not only then in the course of his legal training, but throughout the rest of his professional life. It is a qualification to which he can always point with pride, and which will be very helpful to him in connection with his professional standing, and with his professional advancement.

The same is true with respect to the system of moot court arguments. That, again, is something that is outside the class room, but all of the leading law schools of the country, certainly including the University of Texas Law School [fol. 369] have a system of moot court arguments. It doesn't make much difference, in my opinion, whether those arguments are participated in by first year men or not. It is something to which they have access, but in the second and third years they are permitted to take part in it.

They learn something which isn't taught in a good many law schools in any other way, brief writing, ability to stand up and present an argument before a court, training in that, legal research, all of those are covered by the so-called moot court argument system which prevails generally in the leading law schools of the country.

Q. Dean Harrison, would you say that scholarships, honors, societies like the Order of the Coif, and law reviews, are extraneous and unimportant factors in a law school?

A. They are by no means extraneous. They are an important part of law school life of law schools. To have such an organization as the Order of the Coif is, again, an incentive to the student body, not only looking forward to practicing, one looking forward to a career of public service, but certainly to one who might look forward to law teaching, work on legal research. The fact that he has had an opportunity to be elected to an organization such as the Order of the Coif is an extremely important one to him. All of the matters to which you refer are, in my opinion, an integral and most important part of the legal training, and [fol. 370] are by no means to the slightest degree extraneous.

Q. Dean Harrison, is it true that with one student there is no necessity for a full-time teacher because one student

with the same capacity as other students could get a better grasp of the principles of law than if he were one of 800 students with many teachers?

A. I thoroughly disagree with that point of view, and in my opinion, it is not true, that merely because there should be a small number of students there would be any the less need or desirability for full time professors. Now, the reason, as clearly shown in all of the studies that have been made, the reason for insisting——

Mr. Daniel: Your Honor, that isn't responsive to the question. I would like for him to ask him the questions.

The Court: Yes.

A. I am about to discuss the full-time professors.

Mr. Daniel: I know, but let him ask you for it, please, Dean Harrison, from now on.

By Mr. Nabrit:

Q. Dean Harrison, it has been stated that the reason for full-time teachers is that the teachers will have some chance to individually and personally know the students. Is that the reason for full-time teachers in law schools?

A. That is one of the reasons.

Q. Do you know the other reasons? If so, state those.

A. Of course, I know them; and other reasons equally [fol. 371] important are that the teacher should be available to the students during the usual business hours. The great objection to the part-time lecturer, the lawyer or the judge downtown who comes out and gives an occasional class room hour, the greatest objection to having the whole faculty consisting of that kind of professors is that he will not be available to the student during the ordinary hours when the student is going over the class room notes, his class room discussion, and endeavoring to make up what he calls a digest, or his own review.

Frequently he gets stuck. Something then becomes unclear to him which he thought previously he understood, and so, it has been thought to be a great advantage that the law professor ought to be in the building, accessible to the law students. That doesn't mean that he is accessible every minute of the time. A professor has other duties. He is often engaged in his own research, which is a fundamental reason for requiring a reasonable number of full-time professors, have them there in the law school so that

they should be available to the student outside of regular class room hours, to help him over troublesome spots.

Q. Dean Harrison, are you familiar with the standards of the Association of American Law Schools?

A. I am.

Q. Under the standards of the American Association of— [fol. 372] Association of American Law Schools, would a student who was enrolled and engaged in the study of law at an unapproved law school during its first year of operation, who wished to transfer from that school to one of the law schools in the Association of American Law Schools, would that student's credits be accepted by the school which was a member of the Association?

A. They certainly would not. If a student attended a first year——

Mr. Daniel: Just a minute.

Mr. Nabrit: Just a minute, Dean Harrison. I think he has answered it, too.

The Court: Yes, he has answered it.

By Mr. Nabrit:

Q. Would the fact that students' credits would not be accepted from this school be of any importance in evaluating the legal education of that student and the opportunity for that student at this unapproved school, in comparison with the legal education of a student at another school which was approved, and whose credits would be accepted?

A. Of course, it would.

Q. What is the reason for that?

A. A great many law students, after they have taken part of their education, desire to launch upon a specific kind of career. Many of them are totally unable to judge at the outset of their legal education what they want to do, [fol. 373] and so, not an inconsiderable number of them do think in terms of transferring from one institution to another, after they get a clearer idea of what it is they want to do, particularly if they want to specialize.

A student who is in an unapproved school can not transfer to an approved institution. Let's say at the end of the first year, for example, if the school which he has been attending up to that point has not been approved by the Association of American Law Schools, therefore, there is a distinct advantage to the student who is attending an

approved institution to have that greater flexibility which arises out of the fact that he may, for one reason or another, wish to transfer to another institution, even though he may not have that intention at all when he enters the law school.

Q. That is all.

Cross-examination.

Questions by Mr. Daniel:

Q. Dean Harrison, one of the main advantages of the case system of study is in order that the students may go to the original sources, prepare for recitations on them, and make those recitations in the class room, isn't that correct?

A. That is correct.

Q. That is one of the advantages?

A. That is right.

[fol. 374] Q. Now, let's take a hypothetical case of a hundred and seventy five students in the class room as compared with ten students in the class room, with the same professors, a one hour class period. I will ask you, in your opinion, whether or not a larger percentage of the students in the class room of ten could recite on the cases assigned for the day than in the class room of 175?

A. Unquestionably, a higher percentage of the smaller class would be called on to recite on the cases, but it is necessary for me to qualify that to this extent.

Q. I will let you qualify it in a minute.

A. I must explain my answer now.

Q. I think you have answered my question.

The Court: I think he can explain his answer.

Mr. Daniel: All right.

A. I do want to say that an equally important part of class room discussion——

Q. I am coming to that next.

A. All right, if you ask me a question.

Q. I am not going to leave anything out in the value of the system.

A. Thank you.

Q. The next important- —

Mr. Durham: We object to it. The witness is entitled to answer the question, to qualify his answer. Now he goes [fol. 375] to the next question.

Mr. Daniel: That is going to be just what he is talking about.

Mr. Durham: All right.

By Mr. Daniel:

Q. Now, the next important feature of the case system, as I understood your testimony on direct examination, was the class room discussion, where, after this one student has recited, or as many, as large a percent as possible has recited on the case during the class period, then other students may be given an opportunity to arise and criticize the discussion and make comments; correct?

A. That is right.

Q. Now, I will ask you if it isn't correct that in a class room of ten during an hour's period, with the same professor, if a larger percentage of the students within the class room would not be able to comment and discuss the case than in a class room of 125 during the same period of time?

A. Yes.

Q. That is correct?

A. Yes, but it is here that I want to say that it is equally important what the student hears, as well as the opportunity he has to make his own comment. It isn't alone important that the student have an oppportunity to make comments or suggestions or arguments, but it is equally important, in my opinion, that he should hear the comments and criti- [fol. 376] cisms of other members of the class.

Q. Now, Dean Harrison, you have been teaching that system for several years, haven't you?

A. Yes.

Q. Isn't it an unusual thing for more than nine fellow students to comment on recitations? Isn't that the unusual, rather than the usual thing?

A. No, not in my classes.

Q. I see.

A. There is more likely to be 25 or 30 students in any one hour who will make a comment, not a recitation on a case, but will make a comment or criticism of what has been said by some fellow student or what has been reported upon on the case under discussion.

Q. But in an hour's class where you allow 25 to comment on the recitation given by a fellow student, certainly

you do not get to cover as many cases during that hour as if fewer commented?

A. That is right. You don't cover as many cases.

Q. But in a smaller class of ten where less would be able to comment, not more than nine, ten counting the professor, you would, of course, be able to cover more cases during the hour, wouldn't you?

A. Yes.

Q. Now then, Dean Harrison, I would like to ask you on [fol. 377] the full-time professor proposition if the—a law school has three or four full-time professors for ten students, assigned full time; if they would not be in a position to meets the requirements there of giving as much time as possible to the students, much better than in a school where seventeen professors have 850 students to give time to?

A. Let me be sure that I understand your question.

Q. Yes, sir.

A. Am I to assume that the three or four so-called full-time men spend their time outside of the class in the same building with me, the student?

Q. All right, sir, exactly as—you were here when Chairman Woodward and Dean McCormick testified?

A. Yes.

Q. About the proposed plan for the future of this Negro Law School under discussion?

A. Yes.

Q. If that is adopted, whereby three or four full-time professors are there all of the time, would not they be able to give more of that required time than seventeen would to 850 students at the larger law school?

A. Of course they would, if they are full-time in the so-called new institution, and if they do not go back to the University of Texas after they complete their class room work.

Q. I would like to ask you a hypothetical question. If [fol. 378] you have a separate Negro Law School, let's say in one part of the city with absolutely every facility, physical and otherwise, including soci-ties, fraternities, law reviews, and everything that you have in a white law school in another part of the city, in exactly—with the same number of students, the same faculty and everything else equal except that they are separate schools, one for the whites and one for the colored, I will ask you if, in your opinion,

there would be any chance that a student attending one of those separate schools would not receive substantially equal legal training and procedure from those two schools?

A. In my opinion there is a considerable chance that just that would be the case.

Q. They would receive substantially equal legal education?

A. That they would not, and I say that because whenever you have a student body that is limited to one group, you do not get the kind of representation, cross-section of the community that is so highly desirable in particularly the first year classes of law school.

Q. If I understand your answer to that question, you believe that a law school in one part of the city with 850 white students, the same faculty, everything exactly the same as one in another part of the city with 850 Negro students, everything is exactly the same except they are separate schools, you believe that the student in the white school [fol. 379] would not receive equal or substantially equal legal training with the student over in the Negro School, is that correct?

A. I say that the student in the white school would receive a better legal education, better legal training, because in my opinion, you can not get, under present conditions, a class made up entirely of Negro students that would be as representative of the entire community as would be the case in a class, a school made up entirely of white students.

Q. You don't think there would be any chance of substantially equal educational opportunities then in separate schools?

A. No, the white student would have a decided advantage, in my opinion.

Q. That is all.

Mr. Nabrit: That is all. Thank you.

(Witness excused.)

Mr. Marshall: That is the only one we have.

Court was recessed at 9:45 a. m., until 10:05 a. m., May 15, 1947, following which proceedings were resumed as follows:

Mr. Marshall: May it please the Court, we have one witness whose testimony will be based on some records,

that we will have on the way here, and I think it would be all right, if, with the permission of the Court and the other side, for him to testify to those.

[fol. 380] The Court: Subject to the production of the instruments, I think it would be all right.

Mr. Marshall: They will be here in a few minutes.

Dr. Charles H. Thompson, a witness produced by the Relator, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Marshall:

Q. Will you give your full name?

A. Charles H. Thompson.

Q. And your address?

A. 1230 Fairmont Street Northwest, Washington, D. C.

Q. Your present position?

A. I am Dean of the Graduate School of Howard University.

Q. That is in Washington, D. C.?

A. Yes.

Q. First of all, where were you born?

A. I was born in Jackson, Mississippi.

Q. Will you trace your educational qualifications?

A. Yes. I attended an elementary school, private Baptist school in Kosciusko, Mississippi, and graduated from what I thought was a high school; and I attended Wayland Academy, of Virginia Union University, in Richmond, Vir-

[fol. 381] ginia, starting in 1911, and finishing the academy there in 1914; and subsequently attended college until 1917, and went to Chicago, and spent a year there and got the degree of Bachelor of Philosophy in June, 1918, and then I went overseas in World War I and spent eleven months in France, returned and went back to the University of Chicago, where I took my Master's Degree in 1920.

In 1920-21 I taught at the Virginia Union University in Richmond, Virginia. At the end of that year I went back to the University of Chicago to work toward a doctorate in psychology. In 1922 I went to the State Normal School in

Montgomery, Alabama, and spent two years as instructor in teacher training in that institution.

In 1924 I went back to the University of Chicago and completed the training for the doctorate, and received my Doctor's Degree in 1925. On completion of my doctorate at the University of Chicago I went to the Sumner High School in Kansas City, Kansas, and taught psychology and economics in the Junior College for one year.

Q. Dr. Thompson, on your master's, what was your particular study in your thesis?

A. I made a study of comparative learning abilities of Negro children in the City of Chicago.

Q. Getting back to the positions you have held since you obtained your doctorate, after leaving Sumner High School [fol. 382] in Kansas City, where did you go?

A. To Howard University, as Associate Professor in Education, in 1926. In 1929-1930, I was made Professor of Education. In 1931 and 1932 I was Acting Dean of Education at Howard University.

In 1932 I was made Director of the Bureau of Educational Research and editor of the Journal on Negro Education, and in 1938 I was made Dean of the College of Liberal Arts, which position I held until 1943. Beginning January 1, 1944, I have since been Dean of the Graduate School of Howard University.

Q. Up to the present time?

A. Yes.

Q. Explain to the Court what is the Journal on Negro Education.

A. The Journal on Negro Education is a scholarly magazine in the field of education, which deals primarily with the education of minority groups, and particularly, the Negro group.

Q. And how wide is the circulation of that?

A. It has average circulation of a scholarly journal.

Q. Is it a magazine of general circulation, or a magazine usually circulated among people in the educational field?

A. Primarily the latter.

Q. What then is the Bureau of Educational Research that you are Director of?

A. The Bureau of Educational Research is an organiza- [fol. 383] tion which was set up to make investigations of various types of educational problems, primarily problems

dealing with minority groups, particularly Negroes in America.

Q. Have you published any scientific articles?

A. Yes.

Q. In what publications, as far as you can remember?

A. A number of publications. The Annals of the American Academy on Political and Social Science, Educational Administration and Supervision and several others that I do not recall at the present time, School and Society.

Q. Dr. Thompson, have you done any scientific work, research on the question of the comparative educational facilities for white and Negro students in segregated school systems?

A. Yes, I have.

Q. About how long have you been working on that?

A. Oh, as I indicated a moment ago, I became interested in the problem when I was working for my Master's Degree at the University of Chicago. In 1928, I believe I published the first results of an investigation that I made on the educational achievements of Negro children in separate schools. That was published in the annals to which I referred, in 1928, and since then I have published a lot of things, a list of which I do not have at the present time.

Q. Dr. Thompson, are you familiar with other recognized scientific studies in the field of the comparison of education [fol. 384] of Negro and white students in separate schools?

A. I am.

Q. Have you worked at all with the United States Department of Education in recent years?

A. On several occasions.

Q. Can you briefly give those occasions, and what type of work it was?

A. The first contact with the Bureau was around 1931 or 1932. That wasn't on one of these comparative studies. It happened to be a study of the products of graduate schools of the country. The second contact was a commission called the Wartime Educational Commission. The most recent contact I have had was as advisory member of the National Survey on Higher Education of Negroes, published in 1942.

Q. Was that published by the United States Government Printing Office?

A. Yes, it was.

Q. As an official document?

A. It was.

Q. By the way, while discussing the Government, do you at the present time hold a position on any official commission of the Federal Government?

A. I don't know whether you would call it United States Educational—United Nations Scientific Educational Organization. I am on the National Committee for the United [fol. 385] Nations Scientific and Cultural Organization, which is under the sponsorship of the State Department.

Q. That represents the United States Government?

A. Yes.

Q. In the United Nations organization on education?

A. Yes, commonly known as UNESCO.

Q. Are there any people from Texas serving on that Commission with you?

A. I think Professor Dobie, at the University of Texas, and Dr. Evans, of the Library of Congress, is on that Commission,

Q. Do you have any official connection—what is the National Educational Association?

A. That is an association of teachers in the United States, public and private.

Q. And do you hold any official position in that organization?

A. I am the consultant to the Educational Policies Commission of the UEA.

Q. What is the Educational Policies Committee?

A. That is very much as its name suggests, to study and make recommendations concerning educational policies for development of education in the United States.

Q. Do you know of the Association of American Colleges?

A. Yes.

Q. What is that?

A. That is an association of some five or six hundred [fol. 386] liberal arts colleges in the United States which have come together in an association for their mutual benefit.

Q. Do you hold any official position in that organization?

A. Yes, I happen to be a member of the Committee on Teacher Education of that organization.

Q. Do you know anything about the Nation's Schools, a magazine, and if so, what is it?

A. The Nation's Schools is a magazine in the field of

education that deals largely with administrative and supervisory problems, broad policy problems.

Q. Do you hold any position in that organization?

A. I happen to be consulting editor of that magazine.

Q. Do you hold any position with The World Book Encyclopedia?

A. Yes. I have forgotten my exact title. I suppose it is consulting editor. What I do is edit all of the material concerning Negroes which goes into that encyclopedia.

Q. What is the Southern Association of Colleges and Secondary Schools?

A. The Southern Association of Colleges and Secondary Schools is an organization composed of a number of white secondary schools and colleges in the southern area. It is an accrediting agency for this region, and I presume there are other things that go on in it that I don't know of.

Q. Does that Association accredit white schools in the Austin area?

[fol. 387] A. It does.

Q. Colleges and secondary schools?

A. Yes.

Q. Does it also accredit Negro separate schools in the same area?

A. Yes.

Q. Do you hold any official position in connection with the accreditation of these schools?

A. During the past year and a half I have been an inspector of Negro colleges for the Southern Association Committee which accredits Negro schools.

Q. What were your duties in that position?

A. My duties were to go around with a committee, generally of three, to inspect designated institutions, and to make a report as to whether or not they were living up to standards, in the case of schools already in, and in the case of schools that were trying to get in, to find out whether they met the standards.

Q. How many such schools have you inspected in the last year and a half?

A. Six or seven.

Q. Six or seven?

A. Yes.

Q. Were you requested by the relator in this case to make certain studies concerning higher education for Negroes in Texas?

[fol. 388] A. I was.

Q. Approximately what date?

A. Around the first week in April.

Q. As a result of that request what did you do?

A. Well, the first thing, I had to rearrange my calendar at the University. That was the very first thing.

Q. I mean, in connection with the study?

A. The first thing I did on the study was to exhaust all of the sources that were available to me in the Bureau of Educational Research at Howard University. That was number one. Number two, I exhausted all of the resources in the United States Office of Education, particularly the Statistical Division. By exhaust, I got all of the material and made a study of it, as far as possible, up until about May first, when I got on the train to come to Texas. I have been here since, the last 10 or 12 days; in fact, I got in Austin Tuesday a week ago. I have been attempting since being in Austin to exhaust all possible sources of information relative to the education in Texas.

Q. Where did you go for this information? What I am driving at, what type of information did you examine?

A. First, I went to the Department of Education.

Q. Is that the State Department of Education of Texas?

A. That is the State Department of Education of Texas, to the office of the Executive Secretary of Scholarship [fol. 389] Commission. I have forgotten the gentleman's name, but his secretary was there, and she gave me the information which I desired.

Then I went over to the Capitol Building. That was in the education building here on Congress and something. I went over to the Capitol Building to the State Superintendent's Office, with the intention of talking to the State Superintendent but he was busy and I found I could get the information I wanted from the statistical department in the Superintendent's Office, and I talked to a Mrs. Tanner in that department, and I went to the Division of Higher Education to see if I could get catalogues or audit reports of State supported institutions in Texas, and found I couldn't get them from that office, but I was directed to the State Auditor's Office, where I went and got all of the available latest reports for all of the higher institutions, State supported, in the State of Texas.

Then I went out to the University of Texas for two reasons. First, to get some information, and, second, to see

it and to look over the general plan. I went to the Registrar's Office to get some catalogues, which I did, on various schools. I didn't get all of them that I need, but sufficient. Then I went over the grounds of the University of Texas. I started on foot, and it was very hot, and I got a taxicab and drove all around the place to get an idea of what it looked like. Then I began work on the material. [fol. 390] While I am talking about where I went——

Q. Didn't you also go some place else in Texas?

A. The next place I went was to Prairie View State College, where I spent five or six hours going through that plant, talking with the principal and teachers, looking at the equipment in the various buildings and that sort of thing. I spent a very profitable five or six hours at Prairie View. I hadn't been to Prairie View before, and I was very anxious to get all I could from that institution.

Q. Dr. Thompson, in these studies that you made of the information that you did not have in your own mind, but that you obtained from other documents and records, will you give the Court as many of those documents and records as you can remember, as to whether or not they were official or private documents?

A. Well, the audit reports were official reports.

Q. We will decide whether they were official. Just name them.

A. The State Auditor's Reports, audit reports of the several State supported higher instititutions in Texas. Of course, I had recourse to S. B. 140.

Mr. Daniel: Would you give the dates on those reports, so that we will know how far they go?

A. 1945 and 1946, 1945 for some of them, and 1946. I was told those were the latest available ones. There was one which I did not get which they said was not available, [fol. 391] namely, the report for the Texas Technological College at Lubbock, but I got all of the rest of them.

By Mr. Marshall:

Q. What other documents did you use in your study?

A. Well, I will finish with Texas, if I can.

Q. Fine.

A. I had access to practically all of the catalogues of the institutions, of the State supported higher institutions.

Q. When you say "catalogues" do you mean the published catalogues?

A. The published catalogues of the institutions. There are a few exceptions, of course. I have had access to H. B. 246, which is the current appropriation bill, I think, passed by the House. What else in Texas? State Superintendent's Report, the Regulations of the Board of Trustees of the State Board of Education in Texas. Others will come to me.

Q. What, in Washington, did you use?

A. The reports of the United States Office of Education, the biannual surveys for 1937 and 1938, 1938 to 1940—1940 to 1942; Statistics of Higher Education, Statistics of Higher Education of the United States Bureau of Education for 1943-1944, Statistics on Higher Education for 1945-1946 for some institutions.

Q. As to those Government reports from the Department of Education, what are they based upon, if you know of your own knowledge?

[fol. 392] A. They are based upon reports sent in by the several institutions of the United States Office of Education for compilation and summarizing.

Q. And is that pursuant to the United States Department of Education?

A. Yes.

Q. Is there anything else that you can remember now? If not, we will come to it.

A. The list of accredited schools, United States Office of Education. I have a good memory, but I can't remember all of them.

Q. We will find out. Now, Dr. Thompson, as a result of your experience over twenty-some years in the field of comparing the education in segregated school systems, and as a result of the materials that you have gone into and examined, are you prepared to testify as to the comparative value of the public education in college, graduate and professional levels, in the State of Texas, with statements as to the official documents from which you obtained information that you do not have in your own mind?

A. I do—I am.

Q. As a result of your past experience, your research among recognized scientific sources of information, and your personal observation and examination of official

documents and records while in Texas, have you made a [fol. 393] comparison of the provisions for and the quality and quantity of education offered at Prairie View for Negroes with that offered at the University of Texas and other schools offering college, graduate and professional training for white students in the State of Texas?

A. I have.

Q. First of all, will you name the State supported institutions of Texas above the high school level to which Negroes are admitted?

Mr. Daniel: Your Honor, I would like to interpose our objection to that question. It seems to be the phase where he is about, after having qualified, to testify as to the schools for the purpose of making a comparison in the field of higher education. I would like to make the objection to that question and to the testimony along that line concerning higher education that has been furnished in Texas in the past in other schools other than the two schools that we now have for consideration in this case. The relator's petition asserts an individual right, as held by the Supreme Court in the Gaines case, the right that he has to enter the State supported white school, is an individual right which he has, unless the State furnishes a separate school with substantially equal facilities for the training he desires.

In his petition here, he makes no allegations whatever that would put us on notice that he intends to put into [fol. 394] this case evidence as to all of the other schools, schools he doesn't seek to enter. Whatever the comparative value or the comparative value may have been in the past as to those schools, has no bearing whatever as to his individual right to a legal education, what he is seeking by this suit, and we say that certainly that line of testimony is not admissible. It is irrelevant and immaterial in this case. We will not object to any part of that testimony bearing on the schools that we have directly involved in this case, but as to the other schools, and what has gone on in the past, and not concerned with what we have at the present, we feel is irrelevant and immaterial in this case. It is today, and what we have for the relator today that answers what he has alleged that he is entitled to as an individual right in this case.

The Court: Unless it has a final bearing on this case it would not be considered.

Mr. Marshall: But I can proceed, sir?

The Court: Yes.

By Mr. Marshall:

Q. Will you name the State supported institutions of Texas above the high school level to which Negroes are admitted?

A. Prairie View University.

Q. Would you say—do you know of any others?

A. I don't know of any other school, no.

Q. Any other public supported school?

[fol. 395] A. No.

Q. Will you name the State supported institutions maintained by the State of Texas above the high school level to which white students are admitted?

A. I take it that you mean the four year institutions, rather than——

Q. I do mean four year institutions.

A. Well, there is the University of Texas, and all of its branches; the Texas A. & M., and its several branches, including the Agricultural School at Tarlton, and Prairie View, by the way, is a branch of A. & M., and Texas State College for Women at Denton; Texas Technological College at Lubbock; the Texas College of Arts and Industries, and then there are seven teachers colleges.

Q. There are seven teachers colleges?

A. There are seven teachers colleges, North State Teachers College, and East State Teachers College, West, Southwest Teachers College, the Sul Ross State Teachers College, and Sam Houston State Teachers College.

Q. Making a total of how many?

A. That ought to be twelve, the way I named them.

Q. There are twelve, are there not? And is there another one?

A. It doesn't come to me.

Q. What are the—and I am speaking now, I am asking you to answer this from your experience in his particular [fol. 396] field, and among your associates in that field and the studies that have been made in that field, what are the recognized criteria for comparing education offered in different schools?

A. Well, the adequacy of, at least, the following things which I shall mention: Number one, physical facilities, plant assets, and the general total assets of an institution. The physical facilities, such as buildings, equipment, et cetera. The total assets of the institution would include not only that, but endowments and other items involved. Number two, the amount of current educational funds at the disposal of the institution. Three, the curriculum, courses of study offered, or the course, as the case may be. Four, the faculty. Five, the library. Those are the five generally recognized criteria. I might add, the standing of the educational institution in the educational world and in the community. I don't know whether accreditation would cover it or not, but we will say those five or six.

Q. Now then, in appreciating and comparing one school with another, or one school with a group of schools, do you use any one of these as the most important, or any group of them as the more important, or how are they considered in relative value, the six items you have mentioned?

A. I don't know how you would make any relative value. They are so interdependent it would be difficult to divorce [fol. 397] one from the other. You can't have a curriculum without a building and equipment. At one time we had Mark Hopkins on one end of the log and Garfield on the other, but it is different now. You can't have one of these without the other. They are interdependent.

Q. The first of the criteria mentioned was physical plant. Will you compare the physical plant at Prairie View with that of the University of Texas and other colleges and universities, public supported, that you mentioned above, which are offered to white students?

Mr. Daniel: We wish to renew the objection directly to that question. That has no bearing on any issue in this case.

The Court: I am going to hear it. I am unable yet to relate it to this.

Mr. Daniel: Our bill will go to all of it?

The Court: Yes, sir.

Mr. Daniel: Yes, sir.

A. I have made a study of the plant assets, and the total institutional assets of the eleven institutions that I have mentioned, with the exception of the Texas Technological

College. I have used as sources for my information the audit reports of the State Auditor of these institutions, S. B. 140, and the U. S. education bulletins to which I have just referred. Now, in 1945-46 these institutions, with the ex-[fol. 398] ception of Texas Technological College, had plant assets worth approximately $72,000,000.00. Probably before I go into that, Your Honor, I might state the basis upon which I am determining adequacy and the general criteria of measurement, if you please.

The Court: All right.

A. Beginning with the second Morrill Act——

Q. What is the second Morrill Act?

A. That is the land grant college act in 1867.

Q. Of the United States Congress?

A. Of the United States Congress. There were four Negro schools under the act of 1862 which received some money, some of the land grant money. Then in 1890, when the second Morrill Act was passed, it made provision for all of the Negro schools to receive—all of the Negro land grant schools—to receive a portion of the money, the act reading something like this; that a just and equitable distribution shall be made. That phrase has been in the subsequent amendments, the Nelson amendment in 1922, and Section 2 of the Bankhead-Jones Amendment of 1925. In making out the just and equitable distribution, the administrators of that fund have set up a formula as follows, or substantially as follows: That where you have separate schools and there is to be a division of these funds, that the Negro school or the school separated, or the schools separated, because in some states they have separate schools [fol. 399] for several races, they would receive an amount at least, or a proportion, at least equal to the proportion which they are of the total population.

Q. Is that formula used by the U. S. Department of Education?

A. That is in the case of the distribution of those funds.

Q. As to the U. S. Department of Education and other studies that have been made, and all of the comparisons that you have studied during your years of experience, isn't that the formula that is generally used by the people in your field?

A. Among the majority, I think. I don't know all of them, but I think the majority accept that.

Q. Is that a formula in comparing Negro and white schools where they are separate?

A. Where money is involved.

Q. Where money is involved. Get back to the plants.

A. To explain further the formula; in the State of Texas there are roughly five and a half million white people, and, roughly, one million Negroes. Just for purposes of illustration, suppose that $11,000,000.00 were appropriated to the white schools, that would mean two dollars for each white person in the population. Therefore, I would say it was two dollars per capita total population for the whites. If in the Negro schools one million dollars were appropriated, and there were one million Negroes, that would be one dollar per capita. That is one way I will use the formula [fol. 400] in giving the statistics. The other way is this: the Negroes in the State of Texas constitute 14.4% of the population. Let's assume that ten million dollars were appropriated for the higher institutions in the State of Texas, Negro and white.

On the basis of this formula, it would be expected that the Negroes would receive at least $1,440,000.00, being 14% of ten million dollars. I shall use from time to time that formula in those two ways, if I may.

Q. I want to get back to the plant. I think you testified there were some $72,000,000.00 worth of assets?

A. Yes; I had better be exact about that.

Q. First, let's have that, will you? While the Attorney General is looking at them I want to ask you a few questions.

Mr. Daniel: Those are just his notes?

Mr. Marshall: Yes.

Mr. Daniel: You are not going to introduce them?

Mr. Marshall: No.

Mr. Daniel: He can read them better than I can.

The Court: He can use them to refer to.

By Mr. Marshall:

Q. Using that group of papers you have in your hand to refresh your recollection, and to testify to, to go back to the comparison of the physical plant at Prairie View with these other schools——

A. All right. Now the plant assets of all of the institu- [fol. 401] tions studied, the four year institutions, minus

the Texas Technological Institute, the plant assets of all of those institutions in 1945-1946 amounted to a total of $72,790,097.00.

Q. What was it at Prairie View, according to the same report?

A. Prairie View's plant assets were stated as being $2,170,910.00. Now, recently S. B. 140 has appropriated $2,000,000.00 for plant, so adding that to the Prairie View item, you would get a total appropriation for, or total plant assets for Negro education or higher education as being $4,170,910.00.

Q. May I ask one question there, Dr. Thompson? In arriving at any figure on the physical plant and the assets, is it not proper to include money that has been appropriated and available, even though it hasn't been spent yet?

A. Yes, that is the reason I call it plant assets, rather than physical plant. Under that formula, of $72,790,097.00, which represents the plant assets of the total institutions, if the formula had operated, that is to say, if Negro institutions had gotten 14.4% it would have totaled $10,481,773.00. Instead, however, they got a little over four million dollars. In other words, they got six million—or they didn't get six million, three hundred and ten thousand, seven hundred and sixty-three dollars which they would have gotten under the formula.

[fol. 402] Now, to put it another way, and probably a little clearer, on a total per capita population basis, there were invested in plant assets of white institutions $12.88 for every white person in the State of Texas. There were invested in the Prairie View,—in the plants of Negro institutions—$4.71 for every negro in the population in Texas.

Q. Now, what about the total institutional assets of the two groups, at Prairie View, as compared to the others?

A. In the total institutional assets, they total $162,039,628.00. That is all of the institutions. Prairie View, $2,568,554.00, S. B. 140 appropriated $3,350,000.00, making a total for the Negro assets of $5,918,554.00.

Q. In order that we might have this clear, what is the difference between total institutional assets and the other material you were just giving?

A. The plant assets have to do with buildings, equipment, et cetera. The total institutional assets include not

only that, but also all of the other assets of the institution, endowment funds and all other kinds of funds.

Mr. Daniel: Now, I think he is getting into something on which the records would be the best evidence, if they are admissible at all. We would like to be on notice of what he is counting as endowment for these white schools.

Mr. Marshall: These auditor's reports have all been [fol. 403] subpoenaed, and we told the auditor we didn't want to keep him around, and we had him on call, and he is called. Do you have the reports? He is testifying exactly from the reports, and it is commenting on the basis of evidence that will be in.

The Court: Let's proceed, and you will have your evidence, and we will handle it by motion to strike, or anything else that is proper.

Mr. Daniel: Note our exception.

By Mr. Marshall:

Q. We still don't have clear what you mean by the total institutional assets. What are you reading from now?

A. The Audit Report of the University of Texas.

Q. For what year?

A. For 1945.

Q. And who is it issued by?

A. C. H. Cavness, C. P. A., State Auditor.

Q. Of the State of Texas?

A. Of the State of Texas.

Q. What page are you reading from?

A. Page 4. It includes as assets general operating funds, pledged revenue property funds, and endowment funds.

Q. Now what page are you reading from?

A. Plant funds. Page 6. Plant funds; that is what that includes, generally.

Q. That is what it includes. All right. Now, the last [fol. 404] question before that was that the total appr-iations to the—I mean the total institutional assets for the Negro institution at Prairie View was some five million dollars; is that correct?

A. That is right.

Q. And the total—you gave the total figure for the other institutions as $162,000,000.00?

A. No, that is the total assets of all of the institutions studied, were $162,000,000.00.

Q. That is the institutions of higher learning, including Prairie View?

A. That is right.

Mr. Daniel: Now, Your Honor, I wish to make a further objection to the testimony in this record concerning endowment funds from private sources. In this case, if he is going to make a comparison as to State funds, and I understand that is what he said his ratio was he is testifying about, that we should distinguish between private endowment funds and gifts to this University and other schools, and limit the comparison to State funds.

Mr. Marshall: I don't think we ever took the position we were limiting this to the State funds. I don't care how the University of Texas gets it.

The Court: I don't think it would be material as to the private gifts.

[fol. 405] Mr. Marshall: But it is available.

The Court: I don't think that would work a mitigation to you as to private gifts.

Mr. Marshall: Say we have a university, that both schools get a hundred thousand dollars from the Legislature, and it happens the University of Texas has oil wells that are available and can be used tomorrow morning to build them more buildings.

The Court: Those are state properties.

Mr. Marshall: The endowment is state property.

The Court: But he is speaking of some private person who gave a thousand dollars.

Mr. Marshall: Let's ask this question.

Q. Dr. Thompson, is the figure of endowment included in the auditor's report of the State of Texas as an asset of the University of Texas?

A. Yes.

Q. It is included as an asset in there?

A. Yes.

Mr. Daniel: May it please the Court, may I ask him one question for the objection?

The Court: Yes.

Mr. Daniel: Do you know whether or not that endowment included as assets comes from State funds or private funds?

A. The one I am going to refer to in a moment comes [fol. 406] from State funds.

Mr. Daniel: I am talking about your total you have been testifying about on the University of Texas. Are you in a position to testify whether or not that total endowment and the other assets came from State or private funds?

Mr. Marshall: If Your Honor please——

Mr. Daniel: Have you broken that down to see where the funds come from?

A. It is broken down in the report, but it is included in this figure.

Mr. Daniel: What I am asking you about——

A. Whether I have used these funds——

Mr. Daniel: Your total on the endowment funds is what?

A. $61,000,000.00.

Mr. Daniel: $61,000,000.00?

A. From the State.

Mr. Daniel: Well, that is owned by the State now, you mean?

A. Yes, this came from the State.

Mr. Daniel: Do you know whether or not that endowment came from the State? It is listed under State. Do you know of your own knowledge whether that came from the State or private sources?

A. This report indicates it came from the State. There [fol. 407] are other funds which presumably are the ones which you are referring to, but the $61,000,000.00 came from the State.

Mr. Daniel: I want to preserve my bill on it.

Mr. Marshall: I just remember the testimony that they are relying on, on supposed gifts to our law school to make it equal. They relied on that all day yesterday.

The Court: Yes, I understand.

Mr. Daniel: We testified to it as a gift. Here we want to know what is a gift, and what is State funds, that is all.

Mr. Marshall: That is all right.

A. Shall I proceed?

Q. Yes, Doctor.

A. As I was saying, the total institutional assets of white institutions amounts to $28.66 for each white person in the population. In the Negro schools it equals $6.40 for each Negro in the total Negro population. In other words, the whites have almost four and a half times, to be exact, 4.47 times as much in total assets per capita of the population as the Negroes.

Q. Now, as to the proportion of the population, will you use the figures that are used as to the proportion of the population in the State of Texas?

A. Do I have those figures?

[fol. 408] Q. No, I said, will you give those as to this particular institutional assets, if the formula you mentioned above had been used?

A. If the formula, that is, the 14.4% had been used, Negro higher education would have totaled institutional assets of $23,333,706.00, or $17,445,152.00 more than they actually were. Now, the total assets of the white institutions are proportionately much greater than the plant assets, as you can see, largely because of the large endowment fund which the University of Texas has by reason of money or lands or other material things given by the State. In other words, the University of Texas has an endowment from the State listed as $61,277,162.00 in 1945. Now, if the formula were operative as far as Negro higher education is concerned, Negroes would have had an endowment fund from the State which totaled $8,923,911.00 of the above amount. Now, Prairie View, the only endowment fund that I could find for Prairie View is $26,000.00 in U. S. Government securities listed in the A. & M. audit report for 1945.

Q. Well, now getting to the question of one of the criteria of the current educational, that is, as of the last audit report, limiting it strictly to the current educational funds, will you compare Prairie View with the other schools?

A. In 1943-1944, the latest complete statistics available, in the U. S. Office of Education for all of the schools, in-[fol. 409] cluding those in Texas, I say, all of the schools because I want to compare those with some of the other schools, there is appropriated——

Mr. Daniel: You say that is 1943—what?

A. 1943-1944.

Mr. Daniel: The fiscal year 1943-44?

A. U. S. Office of Education Bulletin for 43-44, for that year.

Mr. Daniel: I want to make the further objection, if this testimony is considered by the Court, what has gone

heretofore wouldn't have any bearing on the case. Certainly the part back in 1943 wouldn't have any bearing on this case, and the facts as they exist today in this Court. We object to it as wholly irrelevant and immaterial, having no bearing on what is available today.

By Mr. Marshall:

Q. May I ask another question? Are those the latest figures in the U. S. Department of Education?

A. They are.

Q. That is our basis for it, the latest available figures that you can use for the comparison, and the 1943-1944 is the latest thing we can get, and I think it goes to its weight rather than its admissibility.

The Court: I think so.

Mr. Daniel: Note our exception.

A. In 1943-'44 Texas appropriated $11,071,490.00 in [fol. 410] State, County and District funds for higher education in Texas. They appropriated to white institutions $10,858,018.00. In other words, $1.98 for each white person in the white population in Texas. Now, in the case of the Negro institutions, or to the Negro institutions, there were appropriated $213,472.00, or 23¢ to every Negro in the total population, or for every Negro in the total population. In other words, $1.98 for the white, 23¢ for the Negro. The whites in this instance, white institutions got eight times, 8.06 times, to be exact, as much as the Negro.

By Mr. Marshall:

Q. You mean per capita?

A. Per capita.

Q. Dr. Thompson, did you examine the appropriations of the 49th Legislature?

A. I did.

Q. What figures did that show?

A. That showed total appropriation, excluding such things as appropriation for firemen's training, teaching hospitals for the medical branch at Galveston and cooperative extension and the like; the total amount of money appropriated for purely educational purposes in the State of Texas was $11,476,519.00 for 1946, and $11,469,478.00 for 1947. Now, to the white four year State higher institutions

there were appropriated in 1947 $11,066,519.00, and in 1947 $11,059,478.00 to the white schools. Now to the Negro [fol. 411] school, Prairie View, there were appropriated $410,000.00, which included $25,000.00 for the scholarship fund, for each of the years 1946 and 1947.

Q. When you say scholarship fund——

A. The out of state scholarship fund for Negro students. On the basis of the formula which I have described, Negro institutions, higher institutions, State supported institutions, should have gotten in 1946 $1,652,618.00. In 1947 they would have gotten $1,651,684.00. May I correct that last figure? $1,651,604.00 is the correct figure. In other words, in 1947 and 1946 the State supported white institutions got $2.01 per capita on the basis of the total population, and the Negro schools for the same years got 44¢ for each Negro of the total Negro population in Texas.

Q. Now, did that figure include the two appropriations of $500,000.00 in S. B. 140?

A. No, it did not, but assuming that to include it, the two appropriations of $500,000.00, which would make $1,000,000.00, for 1947, for this year, and add it to the $410,000.00 which Prairie View got, which would give you $1,410,000.00 the Negroes got, figured per capita on the basis of the total population, it would be $1.53 as against $2.01 for the whites.

Q. And that assumes that the whole million is spent in one year?

A. That is right.

[fol. 412] Q. Well, now going back to the reports of the United States Office of Education for the years 1945 and 1946, and I ask you if the figures you are about to use are the latest figures available?

A. That is right.

Q. Will you compare them, school by school, as best you can?

A. In 1945-1946, Prairie View had 1,576 students. The State contributed to Prairie View $346,250.00 for current expenses.

Mr. Daniel: Hold it just a minute.

A. I would be glad to make these figures available to the Attorney General.

Mr. Daniel: I am having to get it as you go along.

A. I will make it available to you.

Mr. Daniel: I want to get it right now as we go along.

A. The school year 1945-1946.

The Court: We will take a few minutes' recess.

Court was recessed at 11:05 a. m., until 11:20 a. m., at which time proceedings were resumed as follows:

By Mr. Marshall:

Q. May it please the Court, the documents we are talking about, most of them, have come in, these Federal Reports of the United States Department of Education. They have all been certified by the individual officer in the Department of Education, the Executive Assistant, and the certification is pursuant to Section 1601, Chapter 10, Title 42, [fol. 413] United States Code. The Court will take judicial knowledge of them, but we would like to introduce them, with the right of either side——

Mr. Daniel: Do you mean offer the entire volumes?

Mr. Marshall: Sure, with the right of either side to use any part thereof.

Mr. Daniel: We certainly object.

The Court: It would seem to me that would be too big, to put it all in. Just offer the part which is pertinent to this case.

Mr. Marshall: The idea is that the testimony by Dr. Thompson is being made from these records, and I wanted to leave them in until the close of the hearing so that if there is any question, we can go to the documents.

Mr. Daniel: They will be available here.

The Court: Yes, but not introduced in evidence.

Mr. Marshall: That is perfectly all right, but I wanted you to know that we had them. If Your Honor please, in order to keep the record straight, I think the procedure we should follow is that if Dr. Thompson refers to those documents, that we reserve the right, before the case closes, to put in the particular pages of the documents that he has been referring to, and and we will let him pick the pages out.

The Court: I think that is all right.

Mr. Marshall: And that his testimony is on that basis.

[fol. 414] Q. Do you remember where you left off?

A. I was at Prairie View, and East State Teachers College.

Q. That is right.

A. I was saying that Prairie View, with 1,576 students, got from the State in 1945-1946, $346,250.00. East State Teachers College, which is a white institution with 1,205 students, got from the State for current educational expense $448,749.00. In other words, East State Teachers got 30% more money than Prairie View, which had 29.6% more students.

Q. May I ask one question there? Was Prairie View giving, in addition to its regular liberal arts education, did it also purport to be giving graduate training?

A. Prairie View is the teachers college, A. & M. College and University for Negroes in Texas.

Q. And it purports to give Master's training, too, does it not?

A. It does.

Q. Go right ahead.

A. To put it another way, that the student appropriation for East State Teachers College was $372.40; for Prairie View the per student appropriation was $219.70.

Q. You are sure that figure is $219.00?

A. $219.00. East State Teachers had a per student appropriation from the State which was 69.4% larger than the per student appropriation to Prairie View. East State [fol. 415] Teachers College had a per student appropriation from the State which was 45.8% larger than Prairie View's per student appropriation, from both the State and the Federal Government.

The appropriation from the State per student for five teachers colleges for white was $296.10, 34.5% more per student than for Prairie View, and those teachers colleges were East State Teachers, Sul Ross, Southwest, Sam Houston, and North State Teachers.

Now, the proposed appropriation in H. B. 246 in the 50th Legislature carried for 1948, eliminating the items which I have mentioned previously in my testimony as quasi-education, a total of $23,125,323.00 for 1948. For 1949, $27,389,——

Mr. Daniel: What are you reading from now, for 1948 and 1949?

A. The proposed appropriation for 1948 and 1949, H. B. 246 of the 50th Legislature.

Mr. Daniel: I don't think that has been enacted yet.

Mr. Daniel: That hasn't been enacted.

The Court: I don't think it has been enacted.

Mr. Marshall: I don't think it has been, either, sir; we therefore, move to strike that portion of it.

A. Now, as a consequence of such differences as I have indicated in financial support, the Negro has been educa-
[fol. 416] tionally disadvantaged over the years in Texas so far as Texas public higher education is concerned.

Mr. Daniel: We object to that as a conclusion of the witness, Your Honor. He testified to comparative funds. Now he is about to draw a conclusion as to whether or not there has been educational disadvantage on account of that.

Mr. Marshall: If Your Honor please, I will be very glad to ask him a question, and then we will get the objection straight.

The Court: All right.

By Mr. Marshall:

Q. Dr. Thompson, from your experience over a period of years of comparing the educational facilities available to white and Negro students in segregated public school systems, and the recognized treatises you have read on that subject, and I mean scientific treatises, as a result of your work in inspecting colleges and the knowledge you have obtained therefrom, what is your opinion as to the equality of educational facilities offered by the State of Texas to its white and negro students, limiting your opinion to college, graduate and professional training?

Mr. Daniel: We object to that, Your Honor. It has no bearing in this case. His question should be limited to the schools involved in this case, if it is to have any material bearing at all on the case.

The Court: I believe I will hear it.

[fol. 417] Mr. Daniel: Note our exception.

A. The objection has removed the question.

The Court: He will read it back to you.

The Reporter read to Dr. Thompson the last question as shown above.

A. The answer is that Negroes are seriously disadvantaged both from the point of opportunities and relative accomplishment. In the first place——

Mr. Daniel: Now——

The Court: That answers it.

Mr. Marshall: That answers it.

Q. Now, is that based—I want to ask whether or not your answer includes the studies you have made in Texas or not, that you have testified about?

A. Yes.

Q. It does include that?

A. Yes.

Q. Now, will you explain to the Court your reasons for your opinion which you have just given?

A. Well, I have three reasons. In the first place, twice as many white students are provided opportunity in the public higher institutions in Texas as Negroes, and I would like to quote, if it is permissible, from a study, "Senior Colleges for Negroes in Texas," which was made at the direction of the Biracial Conference on Education for Negroes in Texas, Professor T. S. Montgomery, of the Sam [fol. 418] Houston Teachers College, Chairman of the Committee for Study, Dean B. F. Pittenger of the School of Education of the University of Texas, Chairman of the Steering Committee. The study was made and printed about—at least printed, in 1944, presumably made between 1942 and 1944.

Mr. Daniel: Made by whom? You so far leave the impression it is Dean Pittenger.

A. It was made at the direction of the Biracial Conference. Dean Pittenger was the Chairman of the Steering Committee, and Professor Montgomery was the Chairman of the Committee for the study, and wrote up the study, the report.

Mr. Daniel: That clears it up.

A. Now, this report states the following, and I quote:

By Mr. Marshall:

Q. What page?

A. Page 24 and part of 25.

"Texas provided through State-supported senior institutions of higher education for 66.8% of white students enrolled in senior colleges, but for only 31.8% of her Negro students in senior colleges. The ratio of the percentage that the Negro students in the State college are of all Negro college students to the per centage that the white students in State-supported senior colleges are of all white senior college students, is 1 to 2.1. In other words, the State is bearing twice [fol. 419] the burden of providing opportunity for higher education for whites than she is providing such opportunities for Negroes. A disproportionate burden is placed on private effort in providing opportunity for higher education for Negroes."

On page 25:

"The ratio of the number of white students to Negro students in State-supported colleges per thousand of youth of each race, age 15 to 20 is 5 to 1. On this basis the State is providing five times as much opportunity for higher education in State-supported colleges for white youth as it is for its Negro youth."

Mr. Daniel: Give us the date of that report.

A. It is dated April, 1944. Now, in the second place, I said that the differences in financial support resulted in differences in educational accomplishment. In the last census, which was the sixteenth census, in 1940, for the first time the U. S. Bureau of Census attempted to find out the educational level of the population; so that they obtained from all persons 25 years old and over certain information concerning how much education you have had, how many years, et cetera. It was found in the State of Texas that 218,225 persons, or 8% of the population 25 [fol. 420] years old and older have from one to three years of college. That is white. In the case of Negroes 11,704, or 2.5%. Over three times, to be exact, 3.2 times as many whites had one to three years of college as Negro.

Those who had had four years or more of college among whites constituted 5%. Among the Negroes, 1.2%, again, about three times as many.

Mr. Daniel: I would like to know where you are getting those figures.

A. The U. S. Census Report for the State of Texas.

Mr. Daniel: Do you have them for the northern states also in that book?

A. That is Texas.

Mr. Daniel: That is all right. I will ask you about it later.

A. I said a moment ago that the Negro was disadvantaged in this respect, particularly from the point of view of college because, as we all know, an individual has to have two or three years of college before he can get in a law school or medical school or dental school, to say nothing about other areas in which college training is necessary. Now, in the third place, a similar situation exists on the professional level.

Take the matter of doctors. In Texas there were 6,076 white doctors, 164 Negro doctors. In other words, there [fol. 421] were of the white doctors 1 to every 903 of the white population in Texas, and one Negro doctor to every 5,637 of the Negro population.

Thus, on the basis of population, there are more than six times, in fact, 6.24 times as many doctors in proportion to the white population as there are Negro doctors in proportion to the Negro population. For the sake of comparison, in Tennessee, where the Meharry Medical School is located, to which Negroes are admitted, there are almost three times, in fact, to be exact, 2.8 times as many Negro doctors in Tennessee as there are in Texas, where Negroes have no medical school to which they can be admitted.

Take the matter of dentists,——

By Mr. Marshall:

Q. First, one question there. State whether Meharry Medical College is a fully accredited medical college or not.

A. It is.

Q. Go right ahead.

A. Take the matter of dentists. The number of male dentists in the State of Texas, white, are 1,901; Negro 81. The ratio of white dentists to white population is 1 dentist to every 2,886 of the white population, one Negro dentist to every 11,412 of the Negro population. There are almost four times, to be exact, 3.9 times as many white dentists in

proportion to the white population as there are Negro den-
[fol. 422] tists in proportion to the Negro population. Again, taking Tennessee for comparison, in Tennessee where the Meharry Dental College is located to which Negroes are admitted, there are twice as many Negro dentists as there are Negro dentists in Texas, where Negroes have no dental school to which they can go.

In the District of Columbia, where the Howard University Dental School is, there are almost four times as many Negro dentists in proportion to the Negro population as there are Negro dentists in proportion to the Negro population in Texas.

Q. What about engineers, Dr. Thompson?

A. In the case of engineers in Texas, there are 8,961 white engineers in Texas. In the case of Negroes, there are 6 Negro engineers in Texas. The ratio of white engineers to the white population is one to every 612 of the white population. The ratio of Negro engineers and Negro population is one Negro engineer to every 154,065 Negroes. In other words, there are over 250 times as many white engineers in the State of Texas in proportion to the white population as there are Negro engineers in proportion to the Negro population.

Now, finally, take the matter of lawyers. In Texas, and all of these figures are from the 1940 Census.

Q. That is the latest census?

A. That is right. In Texas there were 7,701 white lawyers. There were 23 Negro lawyers. The ratio of white lawyers [fol. 423] to the white population was one white lawyer to every 712 of the white population, one Negro lawyer to every 40,191 of the Negro population. In other words, there were 56 times as many white lawyers in proportion to the white population as there were Negro lawyers in proportion to the Negro population.

Q. Dr. Thompson, getting to the next point of comparison between Prairie View and the other schools, will you compare the curriculum at Prairie View, first, with the curriculum at other schools?

A. May I make this introductory statement about the curriculum? The curriculum and faculty and library are the very heart of an institution. However, you must have sufficient financial resources in order to have an adequate curriculum or adequate library or adequate faculty.

Q. When you say you have to have sufficient funds to have an adequate faculty, are you or not speaking from your experience in getting a faculty for the graduate school at Howard?

A. I am.

Q. You have been in that field for quite a while, and know quite a bit about that?

A. About 15 or 20 years.

Q. Let's compare the curriculum.

A. First, let's take the under-graduate curriculum.

[fol. 424] Q. What is this testimony based on?

A. This is based on the National Survey of Higher Education for Negroes, which was a U. S. Office publication, and also upon the catalogue study of Texas A. & M., University of Texas, and Prairie View.

Q. Go right ahead.

A. The National Survey of Higher Education for Negroes, to which I have just referred, in the making of this survey, found out in Texas that there were 106 under graduate fields of specialization in the white State supported institutions, and 49 in the Negro institution, Prairie View. In other words, there were about twice as many fields of under graduate specialization in the white institutions as in Prairie View.

Now, I have made an analysis, or used the sources, the Texas A. & M. Catalogue and the University of Texas Catalogue, the Texas A. & M. Catalogue states, and that is for 1946-1947, page 10, general information; there are 45 departments of under graduate specialization.

Prairie View University has 13 departments of specialization. In other words, A. & M. has more than three times as many. In the case of engineers, engineering is offered in four white technical schools with eight different curricula leading to engineering degrees. No such curricula was offered at Prairie View, except that you might call mechanical arts education, or industrial education, engineering.

[fol. 425] There are, however, a number of sub-collegiate, or high school trade courses given at Prairie View, such as broom making and mattress making; auto mechanics, carpentering, laundering and dry cleaning, plumbing, shoe repairing, tailoring and the like.

Q. Dr. Thompson, in your experience in the field of education, do you know of any other university in the country

that will give credit toward a degree in liberal arts college for broom making and mattress making? I am talking about universities, not colleges or institutes. Do you know of any recognized, accredited university?

A. No, I don't know of any. I am trying to think. There are several institutions which give similar courses. I don't know of any other institution that gives broom making and mattress making.

Q. Isn't it true that those are the subjects that are usually taught in the high schools or lower vocational schools?

A. That is correct.

Q. For example, do they teach any of the subjects you have mentioned at Howard?

A. No.

Q. Do they teach—did you find in the catalogue of either A. & M. or the University of Texas, or any other of the schools you have talked about broom making and mattress making?

[fol. 426] A. No, I did not.

Q. Auto mechanics or carpentering, or any of those?

A. No.

Q. You can go ahead, if you will, Dr. Thompson, to the graduate level of curricula.

A. Yes. I might mention in connection with the undergraduate field, if I may, because it connects up with the graduate field——

Q. Go right ahead.

A. The chemistry department, the chemistry department, which is a very important department in a land grand institution; the chemistry department at Prairie View is not accredited by the American Chemical Society. I did find they were approved at Texas A. & M. and the University of Texas.

Q. What effect does that have on a student who wants to do graduate work?

A. It means if he wants to do it in chemistry he has to be conditioned a year or a half year; for example, a student coming to us without physical chemistry, which is a thing not given in one of these departments, would have to take a year of that before he could begin his graduate school in chemistry.

Q. You are speaking of Howard Graduate School?

A. Yes, sir.

Q. Is that true in all of the other schools that you know of?

A. I should imagine so. I know it is true in some. I don't [fol. 427] know about all of them. The graduate school is of recent origin. It began about the date of the Gaines decision, which was around 1938. In the fall of 1946 nine state Negro colleges in eight southern states gave graduate work in at least one field.

In Texas Prairie View and the Houston College were the Negro institutions giving graduate work. They had a combined enrollment at Prairie View for the regular term and summer of 1946 of 229; Houston College, 308, making a total of 537 students. Graduate work is given in all of the white four year State high institutions in Texas.

The regular term enrollment in white State graduate schools in 1945 was 2,358. Thirteen white State institutions gave 2,846 Master's Degrees and 212 doctorates during the period 1940 to 1945. That is from the Director of Colleges, universities offering graduate work relating to Master and Doctor Degrees, 1940 to 1945, U. S. Office of Education.

Prairie View gave during this same period 103 Master's Degrees and 55 Negro students got Master's Degrees on the out of state scholarship fund, and six doctorates on the out of state scholarship fund between 1939 and 1943, making a total of 159 Negroes who got graduate degrees during approximately a five year period, as contrasted with some 3,000 white students who got graduate degrees in the same period. Now, in general, the range of offerings in white [fol. 428] graduate schools, whether in Texas or in other southern states, is wider than in the Negro graduate school. The National Survey of Higher Education for Negroes, to which I have referred, a U. S. Office publication, indicated in 1942 that the Texas state supported higher institutions for whites offered graduate work in 65 fields, and 5 for Negroes.

At the present time Prairie View offers graduate work in 13 fields, and the Texas A. & M. 45 fields. The University of Texas gives 10 different types of graduate degrees in 40 fields. Prairie View gives a Master's Degree in 13 fields.

The Court: I suppose this would be a good point, then, to resume, then, at two o'clock.

(Court was recessed at 12 noon May 15, 1947 until 2 p. m., May 15, 1947.)

[fol. 429] Afternoon Session, May 15, 1947. 2:00 P. M.

Dr. Charles H. Thompson, having resumed the stand, testified further as follows:

Direct examination. (Continued.)

Questions by Mr. Marshall:

Q. Dr. Thompson, when we closed I think you were testifying as to the curriculum of the under graduate schools.

A. No, I was on graduate schools.

Q. Continue on the graduate schools.

A. The University of Texas and A. & M. College of Texas, between the period of 1940 and 1945 gave 212 doctorates. Now, if a Negro wishes to obtain a Doctor's Degree in the State of Texas, the only recourse he has in so doing is through what is admittedly an inadequate scholarship fund.

Mr. Daniel: I want to——

The Court: Well, I think that part "admittedly"—you can withdraw that.

Mr. Marshall: I withdraw that.

Mr. Daniel: The inadequate part, too, unless followed by some proof.

The Court: That is right.

Mr. Daniel: Admittedly inadequate.

[fol. 430] By Mr. Marshall:

Q. Doctor, we will get to that later.

A. All right. Now, in order for a Negro to be eligible for an out of state scholarship to do graduate or professional work he must be a resident of Texas; he must have resided in the State of Texas for eight years. In order for a white student to do graduate work, all he has to do is be white, and maybe a resident of Texas, because out of state students are admitted in the graduate school at the University of Texas. The out of state scholarship fund provides $100 a semester in all fields except medicine, where it is $150 a semester.

It provides round-trip to the school of the student's choice at three cents a mile, less the following items: the tuition fee paid to the University of Texas, which is stated as $25 a semester, less the round-trip fare from the student's

home to Prairie View. The student may also get ten percent of the total award. In other words, a student may get a maximum of $165.00 for tuition for the regular year, that is, two semesters, and three cents a mile for transportation, less the round-trip from Prairie View.

Now, I have an illustration that was given on the Scholarship Committee Report of a student who wished to attend Columbia University, taking fifteen percent. The tuition was approximately $407.00, the railroad fare was $96.00. That student received from the scholarship fund $165.00 for tuition and $70.00 for railroad fare, making something [fol. 431] like $235.00 out of a total which he would have to pay, merely for railroad fare and tuition to go to Teachers College, Columbia University, of five hundred and eight dollars and some cents, making the student pay $237.00 himself.

Now, the cost per student at the University of Texas in 1945-1946, at the Main University was $511.00. At the Texas A. & M. College, after eliminating the funds for cooperative extension, the cost of instruction per student was $734.00 for the same year. The State spends $200 to $500 more in these institutions to educate a white graduate student than they spend on the Negro student who wishes to do graduate work on a scholarship.

Q. Dr. Thompson, how important is the question of opportunity to do research in a well recognized and well organized university?

A. It is very important indeed.

Q. Have you made any comparison as to the research opportunities available at Prairie View with the other colleges you have mentioned?

A. Yes, I have.

Q. What is the result of your study, please?

A. The results show, taking a sample of five white high institutions of four years, shows that they expended in 1945, 1946, $2,753,809.00 for separately organized and [fol. 432] budgeted research. Prairie View received for that year, 1945-1946 nothing, as in previous years, for separately budgeted and organized research.

On the basis of the formula which I described this morning, Prairie View or Negro higher education would have received $396,547.00. In 1946 Prairie View was voted $10,000.00 by the Texas A. & M. Board of Directors of the Experiment Station to set up a sub experiment station at

Prairie View to be known as Sub-Experiment Station No. 18. This is all of the money that Prairie View has received, to my knowledge, for research.

The Federal Government in 1945 made an appropriation, or gave Texas A. & M. College $251,288.00 for experiment station research. In taking into account the amount of money that the State puts in, if the formula had operated, Prairie View or Negro higher education would have received $36,185.00.

Q. The question was raised as to how much did they receive, Prairie View?

A. $10,000.00 in 1946 for the special purpose of setting up that Sub-Experiment Station No. 18.

Q. That came from Texas A. & M.?

A. That is right.

Q. Have you compared the professional curriculum of Prairie View with other schools?

A. I have.

[fol. 433] Q. What are the results of your studies on that?

A. Well, in medicine, I might state, as a general background, that there are three Class A medical schools in the State of Texas; two private, Baylor and Southwestern, and one public, the medical branch of the University of Texas. The University of Texas catalogue, 1945-1946, lists 353 students. They receive from the State for current expense, not counting the amount of money that went to the three hospitals which are used for clinical purposes, $694,165.00 for the year ending 1946. In other words, there was a cost per student of around $1,800.00 or $1,900.00. Now, a Negro student who wants to take medicine in the State of Texas, his only recourse is to the scholarship fund, which I have mentioned previously. Even if the student attended McGill University in Montreal, Canada, and I pick that because it is the farthest away and it would cost more for travel, he would get less than $500.00 for mileage. McGill is 2,100 miles. The State spends more to educate a white medical student in the University of Texas than they spend on a Negro student through the scholarship fund, and there are six times as many white doctors in the State of Texas in proportion to white population as there are Negro doctors in proportion to the Negro population.

Now, taking the matter of dentistry, the State pays around $1,500.00 per dental student. A Negro who wishes to study [fol. 434] dentistry can not get more than $400.00 from the

scholarship. Thus, the State spends a thousand to eleven hundred dollars more for the dental education of a white student than for a Negro student through the scholarship fund, which probably explains why there are almost four times as many white dentists in proportion to the white population than there are Negro dentists in proportion to the Negro population.

Q. Without comparing the curricula at all, or other items, how many accredited law schools do the records show there are in Texas?

A. Three—let's see. Yes, three, Baylor and S. M. U. and a public law school, the University of Texas.

Mr. Daniel: Accredited by whom?

A. The American Bar Association.

By Mr. Marshall:

Q. Now, getting to the fourth point of the criteria to compare schools, public education in general, did you compare the faculty at Prairie View with the faculty at these other schools you have testified to?

A. I have.

Q. What do the results of your examination show?

A. I might say that the basis of my examination is twofold. Number one, salary; number two, training. Obviously, to have a good faculty and to hold it, you have got to pay them attractive salaries and give them satisfactory [fol. 435] working conditions. That is why I took salaries from the point of view of training. I wanted to see whether or not the training at Prairie View seemed to be, or some of the members, at least, seemed to be equal to the training of some of the white teachers in some of the white State teachers colleges and other higher institutions, which got high salaries.

Now, as to salaries, the salaries in general at Prairie View are too low, in general, to attract and hold a sufficiently large number of good teachers, or even to meet the competition from other Negro colleges, as I will point out in a moment.

Q. Do you, as Dean of the Graduate School of Howard University, have any knowledge as to the necessities of this Negro university as to faculty members?

A. Very definitely so.

Q. Is the item of salary an item that is at least a part of the consideration?

A. A very large part.

Q. Go right ahead.

A. Now, I would like to refer again, if I may, to the study that I referred to, Senior Colleges for Negroes in Texas, in which two statements, at least, were made concerning salaries. Page 36, the first statement, and it is as follows, and I quote:

> "With reference to Prairie View further study was [fol. 436] made to determine the number of faculty members who had accepted offers from institutions outside of Texas. Investigation disclosed that twenty-five 'well prepared and able teachers' were lost to other institutions within the past five years because of the inability of Prairie View 'to match their salary offers.' Of the twenty-five faculty members lost, eleven held the degree of Doctor of Philosophy."

The next quotation, page 39:

> "In no professorial rank is the median salary in Prairie View equal to the lower limits of the range in State supported white colleges. The median salary of a full professor in Prairie View is $2,025.00, while the lowest salary paid a full professor in a State supported white college is $2,700.00. The corresponding figures for associate professor are $1,530.00 and $2,000.00; for assistant professor, $1,520.00 and $1,800.00; and for instructor, $1,170.00 and $1,500.00."

Now, not only was that statement true in 1942 or 1943, when it was gathered for this study; the same is true in 1946 and 1947. Except one white teacher in thirteen white State supported higher institutions, holding comparable positions in comparable departments, the highest salary paid a full [fol. 437] professor in Prairie View is lower than the lowest salary paid a white professor in any one of these thirteen institutions, on a nine months basis.

Again, the principal——

Mr. Daniel: May I interrupt there? May I get this down to date? What is the date of it?

A. 1946 and 1947..

Mr. Daniel: And the data you read a minute ago was——.

A. From this book in 1944, which was in 1942 or 1943. The principal of Prairie View in 1946-1947 got a salary that was $1,000.00 less than the lowest paid head of any four year State supported institution in Texas.

By Mr. Marshall:

Q. In going through the records of these several institutions, did you find any other institution in Texas giving college and graduate work that has a principal at the head of it?

A. No, I haven't.

Q. Have you ever heard of any University in the United States giving graduate work that is headed up by a person with the title of principal?

A. No, I haven't.

Q. What is the usual title?

A. President or chancellor, or something of the sort.

Q. Go right ahead.

[fol. 438] A. Now, Prairie View's faculty as a whole obviously—I won't say obviously—Prairie View's faculty as a whole isn't adequately trained. However, there are some adequately trained teachers at Prairie View, and naturally they should be paid accordingly. Let's look at the training for the moment. In 1940-1941, and this is found in the National Survey of Higher Education for Negroes, page 31, —page 14, 8.33% held the Doctor's Degree, 45.5% held the Master's Degree. In 1942-1943,—this is from the Senior colleges, this study here, Senior Colleges for Negroes in Texas, in 1942-1943, 6% had the Doctor's Degree and 52% had the Master's Degree. In 1945-1946, according to the Prairie View catalogue, and the degrees listed therein, 9.3% had a Doctor's Degree 52.3% has the Master's Degree. I said a moment ago that Prairie View would obviously have to raise salaries considerably in order to meet the competition of other Negro colleges. There are some four or five Negro colleges, to my knowledge, that pay as much as $5,000.00 for a full professor.

Q. Isn't it also true that in recent years Negroes have been given opportunities to teach in colleges that are not designated as Negro universities?

A. That is true. There are some fifty or sixty Negroes now teaching in northern institutions.

Q. So that you have additional competition now?

[fol. 439] A. That is right.

Q. You go right ahead.

A. The library, obviously, is very important. It is the life-blood of graduate work. The present library holdings of Prairie View are 25,000 titles, 465 serials.

Q. I think we know what titles are. What are serials?

A. Any sort of thing that runs in serial magazines and proceedings which run in serials. Leaving out of account the library at the University of Texas, which is one of the best university libraries in the south, it certainly has the largest collection of any university in the south, and taking the State Teachers Colleges libraries, the holding of white State Teachers Colleges libraries in Texas are larger than Prairie View. For example, the holdings of twelve white, four year schools, that is, teachers colleges and four schools in 1945, ranged from 28,357 in the Texas College of Arts and Industries, to 750,974 in Texas University.

North State Teachers College had more books, 144,426, than all the Negro public and private colleges in the State of Texas in 1945. The number of books that the negro colleges in Texas was supposed to have in 1945 was one hundred and ten thousand and something.

Now, East State Teachers College, with 1205 students in 1945-1946, had library holdings of 81,974 volumes in 1945, as compared with Prairie View in 1947 with 1619 and [fol. 440] 25,000 volumes.

The Southwest State Teachers College, with a student body of 957 students, had 56,612 volumes in the library in 1945. The Sam Houston Teachers College, with 1401 students in 1945-1946 had 63,100 volumes in the library in 1945.

Q. Dr. Thompson, from your experience as Dean of the Graduate School of Howard University, is it one of your responsibilities to ascertain as to whether or not that library is kept up to standards for accredited graduate schools?

A. That is true.

Q. And in your position as inspector for the Southern Association of Colleges and Secondary Schools, is it one of your jobs to inspect, as to the adequacy of libraries in the colleges?

A. Yes.

Q. On the basis of your experience in those two fields over a period of years, what is your opinion as to the adequacy of the facilities which you saw and inspected at Prairie View last week?

A. Well, frankly, they are inadequate.

Q. Did you see the library at the University of Texas, for example?

A. I didn't go in it.

Q. Are you acquainted with the number of books in it?

A. I am acquainted with the holdings.

Q. How does Prairie View library, regardless of the num- [fol. 441] ber—just the number of books—is there any semblance of equality between the two?

A. There would not appear to be.

Q. And the figures you have given on the books are figures that are used in that opinion of yours; is that correct?

A. That is right.

Q. Do you believe that Prairie View's library is adequate to maintain a graduate school?

A. In fact, Prairie View doesn't have a first class under graduate library. That isn't only my opinion, but the opinion of this survey committee. They quoted the late Dr. Bishop, who was one of the outstanding librarians, who was last at Michigan, if I may quote that, page 64, and this is the quotation:

> "A well selected library of 50,000 volumes will perhaps suffice for the needs of sound teaching in a college of not more than 500 students. This number does not include duplicates."

Q. Does Prairie View have anywhere near that amount?

A. They have 25,000 volumes.

Q. And how many students?

A. 1619, I think I mentioned that a moment ago, 1619 students.

Q. Dr. Thompson, in the earlier part of your testimony, I think your last criteria was the one of—I don't think this is the exact phrase for it—accreditation or standing in the [fol. 442] scholarly world. Did you check on the accreditation of Prairie View with the other public supported schools in this state?

A. I did.

Q. What was the result of that study?

A. Well, the results that I found are as follows: I might explain, in order to explain what the results mean, the highest accreditation which any college can get in this country is to get on the approved list of the Association of American Universities. The highest accreditation that a university can get is to be a member of the Association of American Universities. There are three white State schools on the approved list of the Association of American Universities; Texas A. & M., North Texas State Teachers, and Texas College for Women.

Q. What about the University of Texas?

A. The University of Texas is a member of the Association of American Universities.

Q. Is Prairie View a member?

A. No, Prairie View is not a member.

Q. Is it accredited by that association?

A. No.

Q. Well, did you—about how much accreditation did you find Prairie View to have?

A. Prairie View is accredited by the regional association [fol. 443] in this area, the Southern Association.

Q. Does it carry any other accreditation that is recorded in the legal proceedings, that you know of?

A. Not that I know of, except the State accredits the institution, of course.

Q. Well, now, what about for example, the Medical School of the University of Texas? Is that accredited or not?

A. Yes.

Q. What about the—it is already in about the Law School. What about the School of Engineering?

A. The School of Engineering is accredited by the Engineering Council for Professional—I will give you the name of it—Engineering Council for Professional Development.

Q. Dr. Thompson, as a result of your study that you have made of Prairie View with the other schools and universities in this state that are publicly supported, can you compare favorably—can you compare Prairie View favorably with any one of them?

A. I don't think so, at present. I can't think of any institution that it would compare—would you define "compare favorably" for me, so that I may be sure to know what you are talking about?

Q. Pick the smallest State teachers college in Texas—your mind. Tell the Court whether or not there is any State supported school in the State of Texas that will give a Negro the equivalent of the education that can be obtained by a [fol. 444] white student in the smallest of the teachers colleges in Texas.

A. I doubt if I can answer that.

Q. I will ask you this. In your criteria you used to compare the schools, how do you compare Prairie View with the Univeristy of Texas?

A. There is no comparison there. I can answer that.

Q. What do you mean, there is no comparison?

A. I mean that Texas University is a university. Prairie View is the university—I don't know how else to say it. It is a poor college.

Q. And it isn't—and is it or is it not a university in the field of general educational policies?

A. You mean on paper?

Q. No, as it exists today. Is it or is it not a real university?

A. No, it is not a real university.

Q. Can it give to the Negro student the type of education that is given to the white student at the University of Texas?

A. Not at all.

Q. Can a graduate student attending Prairie View University get the type of education that a graduate student at the University of Texas can get?

A. I doubt it very seriously.

Q. In your experience in your field of education, and as Dean of the Graduate School, is it possible to put graduate [fol. 445] work, adequate graduate work training on to a school that gives inferior under graduate training?

A. If I may turn the question around, I would say it is highly undesirable. It is possible to put it on there and have just as poor graduate work as you have under graduate work.

Q. Would it inevitably follow that the graduate work would be inferior?

A. I think so.

Q. Your witness.

Cross-examination.

Questions by Mr. Daniel:

Q. Dr. Thompson, you are not opposed to good separate schools for Negroes, are you?

A. Would you mind elaborating on that question?

Q. I mean, based on your experience as an educator, for the best interests of all of the people concerned, are you opposed to having the establishment of good separate schools for Negroes?

A. Emphatically, yes.

Q. You are opposed to it?

A. I am.

Q. Do you know Ambrose Caliver?

A. Yes, I know Dr. Caliver.

Q. Is he a Negro or a white man?

A. He is a negro.

[fol. 446] Q. Are you acquainted with his summary made for the National Survey of Higher Education of Negroes for the United States Department of Education? I will hand it to you and see if you are acquainted with it.

A. I am generally acquainted with it.

Q. The book that you have there in your hand, I will ask you to state whether or not that is a similar study to the one you have testified here about on direct examination?

A. It is one of the series of volumes of that study.

Q. The one you have testified about, I believe, is dated 1942, is it not?

A. That is right?

Q. The one I have handed you is dated 1943, is that right?

A. That is right.

Q. That is the latest one out, the one you have in your hand now, isn't it, the latest one you have any knowledge of?

A. May I give a qualified answer to that?

Q. All right.

A. The summary was written after the other volumes were set up, naturally.

Q. Yes.

A. And was printed after that. That is why it bears a later date.

Q. That is the latest thing then arrived at from the work that was printed ahead of it?

A. It is a part of the study summarized by Dr. Caliver.

[fol. 447] Q. Your Honor, I would like to make clear that I am cross-examining him, and I still want to retain my bill of exception, and I am cross-examining him just in case the Court desires to consider this evidence.

The Court: All right.

By Mr. Daniel:

Q. Is Dr. Caliver a recognized authority in the same field that you have testified about that you are acquainted with, through experience and training?

A. By some people, yes.

Q. Well, do you recognize him as such?

A. In some areas, yes.

Q. He has made a much more comprehensive study of the subject in preparing this work for the Government than you have in preparing for your testimony here today, hasn't he?

A. I doubt it.

Q. You doubt that?

A. Yes.

Q. I will ask you if you agree with his conclusion contained in this work that the kind and amount of education needed by any individual or group in a democracy at any given time is determined by their capacities, their interests, their abilities, disabilities, and their goals?

A. Certainly.

Q. You agree with that?

A. Yes.

[fol. 448] Q. Do you agree to his conclusion here in this summary that in addition to taking into consideration the amount of money spent and the facilities available, in determining the question as to whether or not equal opportunities are offered for higher education, that in addition to all of that, in determining what should be offered, that you should take into consideration the environment and social order of the particular area in which the schools are established?

A. I don't know that I get that. Would you mind restating it?

Q. Suppose I read you what he says, and then you tell us whether or not you agree to that. This is from page 1 of this summary:

> "National Survey of the Higher Education of Negroes, a Summary,"

printed in 1943 by the United States Office of Education:

> "Formerly in our educational processes, particularly in organized education, this inter-relationship has not always been recognized,"

talking about inter-relationship between social order, that I have been talking to you about, and the fixed facilities.

> "The Survey of the Higher Education of Negroes, however, which this volume summarizes, attempts to view education in its social setting, and consequently, not only are institutional matters studied, such as student personnel, curriculum, faculty, administration, and other facilities, but also the social and economic [fol. 449] factors surrounding the institutions and influencing the lives of the students and their communities."

Now, my question is, do you agree with that statement from the summary that these educational things, in addition to what you have testified about here today, must necessarily be taken into consideration in deciding upon how you can offer equal educational opportunities in a given community?

A. That was a basic assumption underlying all of my study. What Dr. Caliver means there is apparently the thing that I do not agree with. I have argued with him about it.

Q. You don't agree with his conclusion on that?

A. I don't agree with his general educational philosophy of what a university of college is, or what it is supposed to do for an individual.

Q. Do you agree with this portion of the summary?

> "In saying, therefore, that the higher educational needs of Negroes should be considered in light of their backgrounds and special interests, a principal is enunciated which applies equally to any other group in our body politic."

A. I think that perfectly odd.

Q. Do you feel like, for a white student you should establish the kind of school the need or demand calls for?

A. Yes, and if I may explain that, I don't think there are [fol. 450] any needs among the white part of the community that are not among the Negro part, or shouldn't be.

Q. You have been here through this testimony today, haven't you?

A. I certainly have.

Q. I don't mean today. You have been on the talking end of it today, but since the case began Monday morning?

A. Off and on.

Q. You have heard it testified here that the relator in this case is the first applicant for law to the only State Law School that was in existence at the time he applied, haven't you?

A. I believe I heard that, yes.

Q. Yes. You know of no other applicants for law, any other students who wanted to take law in the State today before this time?

A. I didn't even know he wanted to take it before this case came up. I don't mean to the facetious about that.

Q. I understand. I don't mean to be, either. I am trying to lead to the point as to your opinion as an expert as to what should be available before there is a demand for it. In other words, is there is only one Negro student who wants to take law, none before him, do you feel like that the State should have provided a law school prior to that time for Negroes?

A. I think that the State should have provided for Negroes [fol. 451] in 1876 or whenever it was that Prairie View University or the Texas A. & M. was set up. I think it should have been then. The fact that only one Negro student wants law, it seems to me, is immaterial in this state or any other state, from my point of view.

Q. You don't teach broom making and mattress making at Howard University?

A. No, those are not college subjects.

Q. You don't have demand for them?

A. Negroes have demands for them, and we teach them in the trade schools where they ought to be taught.

Q. Until there is a demand for certain subjects at Howard University that you do not now teach, you just don't offer them, do you?

A. That isn't true, no. You see, there is a difference between demand and being able to meet the demand. We put on three departments last year that we didn't have. We didn't know a single student would take those subjects, geology, geography and another that I can't think of at the moment. We put those subjects on, not because of the fact that we had a demand, but because we thought students ought to have the opportunity to get an education in those fields, and I think the same thing about a university. The opportunity ought to be there, because the opportunity itself is stimulating.

Q. Regardless of whether the students want to take the [fol. 452] courses or not?

A. That is right. The only way to determine whether a student wants to take a course is to make it available, in my opinion.

Q. Now, you have studied—you have read the survey and the summary that has been made on this question, you have testified about, by the Federal Government, haven't you Dr. Thompson?

A. Two or three years ago, I read the summary. I read the other volume because, to be perfectly frank with you, I knew Dr. Caliver, and I didn't agree with him on educational philosophy, and I knew about what he would put in the summary. I was interested in the basic facts so that I might draw my own conclusions rather than have his conclusions.

Q. Let me read another one.

> "Changes in the social structure—of which the educational system is a part—must come slowly if disorganization is not to result."

A. I agree with that.

Q. Then, in order to solve this problem that we have here, as you have testified about, in your opinion, in this State the problem that you have testified about as having existed in past years, don't you believe that the only way to solve it is by a gradual change, a gradual change from failing to furnish equal educational opportunities to a system, setting [fol. 453] up those equal educational opportunities by State supported schools?

A. If I may answer it this way, I would have answered the first part of your question yes, but the latter part force

me to say no. May I explain? I think I know what the question that you started out—I won't put it that way. I think I know what you are driving at.

Q. You answer what you think I am driving at, and if you don't get it, I will come back.

A. What you are saying in so many words is this, is what I think you were saying, assuming that this thing ought to be done gradually, the change ought to be made gradually.

Q. I am not saying it. I have read from Dr. Caliver here, and I asked you did you agree with him.

A. You gave me a question.

Q. Yes, I did. Go ahead.

A. Do you want me to answer your question, or Dr. Caliver?

Q. Go ahead and answer what you understood I am driving at.

A. What I understand you to be driving at is this; that where we have certain customs in the south, and to change overnight would cause disruption of one sort or another, you are saying gradual change, that is more or less authentic, it seems to me. You have got to start somewhere. This is the first time I have been to Texas. I have been in practically all of the southern states, and was born in the south, but I [fol. 454] have been very much impressed with it since I have been to Texas, by both the white people and the Negroes in Texas. I think you are a very progressive community. It is my opinion that the time is ripe to start with professional and graduate work. I think it could very easily be done in law, and then work gradually. That is what I mean by a gradual change. Of course, if you tried to change the system overnight from the kindergarten through the University, you might have more disruption than otherwise; and yet, I don't know whether the disruption would be so much at that.

I think, to answer your question, to *be* begin with the law school and graduate school, and then the college and high school and so forth, that that would be a gradual change, and I think most people would agree that is gradual.

Q. Whatever the State should do to accomplish the purposes we have both been talking about, whatever should be done, don't you believe should be first taken into consideration the desires of the Negro citizens of this state, if that is what they want, the general desires of the Negroes as to

what they want? Just answer yes or no so that we can speed along.

A. I don't want to speed along and answer it wrong. May I answer and qualify it?

The Court: You may answer and explain it.

A. The thing that has surprised me; I have been pleas- [fol. 455] antly surprised to see that Negroes really want to go to the University of Texas.

By Mr. Dan[illegible]:

Q. That isn't responsive to my question at all.

A. I am merely explaining.

Mr. Daniel: I ask that it be stricken.

The Court: I doubt if it is responsive to the questions.

A. Very well, Your Honor.

By Mr. Daniel:

Q. You are acquainted with the facts and figures as to the number of northern Negroes who come to southern separate schools for education, are you not?

A. In a general way, yes.

Q. I will ask you if this statement by Dr. Caliver, in your opinion, from your studies, is substantially true?

> "While southern Negroes often go north for graduate work, there are large numbers of Negroes resident in northern states who go south to attend Negro colleges. Moreover, even in northern colleges and universities there are often, if not usually, special problems which confront Negro students regardless of their places of residence or previous training."

A. I think that is true.

Q. I will ask you to state whether or not you are acquainted with this survey and the conclusion drawn from it [fol. 456] by Dr. Caliver, making the survey of eight northern universities where negroes were admitted. This is from page 13.

> "Whereas very few southern Negroes were attending these eight northern universities in 1939-40; in the year preceding, nearly 4,000 northern negroes attended Negro colleges. Almost three thousand of this number

attended colleges in southern states. The majority of these Negro students were residents of eight northern states which rank high in economic resources. Thus, instead of the northern states carrying an undue burden in the higher education of Negroes, it appears that institutions located in those states which have the least wealth are providing educational facilities for Negro residents from more economically favored regions."

Do you agree with that?

A. I think the facts stated in the first part of the statement are correct. I think the implications may not be.

Q. In other words, the majority of your northern Negroes who have available to them institutions that they can attend, a majority of the northern Negroes attending colleges actually elect to go to separate Negro schools?

A. No, that isn't true. Dean Caliver said they studied eight institutions. The 4,000 students came from all over the [fol. 457] north, is that correct?

Q. Yes. Do you have the figures on how many Negro students are attending college, northern Negro students?

A. We made a survey—Dr. Jenkins, who was a member of the Bureau of Educational Research, made a survey this fall.

Q. Could you get that for us by morning?

A. I might have it here. I don't know. I will look and see. I haven't—let's see, in 1945, there was something like five or six thousand Negroes attending school in the north, and the estimate now is that about twice that many, because of the G. I. Bill and things of that sort.

Q. Suppose you try to get me those figures overnight?

A. All right.

Q. Have you read the conclusion by Dr. Caliver as to what is the best thing to be done for the Negroes who want to have equal educational opportunities in both the north and south, contained in this summary, or survey you have been testifying about here today, under Chapter 6, pages 40 through 50? Have you read that? Are you acquainted with that?

A. I probably read them, but as I said a moment ago, I don't put much weight on the conclusions, because Dr. Caliver and I don't have the same educational philosophy.

Q. You don't find anything in his conclusions which would

indicate that it was necessary to do away with separate schools in order to give equal opportunities?

[fol. 458] A. I don't remember his conclusions, but I doubt seriously if he put that in print, being in the Office of Education.

Q. That is the conclusion that he has on that matter. Is that one you disagree with him on? You know what his conclusion is?

A. His public conclusions and his private conclusions may be different. You are talking about his public conclusions.

Q. You tell us you know his private conclusions, and you disagree with them. Isn't it true his private conclusions are like his public conclusions here, that separate schools, if established on an equal basis, can solve the problem as far as giving equality of educational opportunity to the Negro students?

A. I have come to the conclusion from discussions with him that his private conclusions are not that, but his public conclusions are probably motivated by the fact that we have separate schools, and if a Negro is going to get an education, he has to go to them until we get an integrated situation.

Q. You are not positive about his private conclusions?

A. No.

Q. You wouldn't undertake to tell this Court the man has signed and printed something for the Government other than what he actually believes about it, would you?

A. No, I wouldn't do that.

Q. Now, as I understand, all of your testimony as to what [fol. 459] you have examined in the way of funds available for Negro students as compared with white students, up to the pending bill over here in the Legislature for this session, and Senate Bill 140, which is already enacted, had to do with past years, what had been done for Negroes in past years, as compared with white schools; is that correct?

A. Up to 194[illegible].

Q. Up to 194[illegible]?

A. That is ri[illegible]t.

Q. The school [illegible]ear 1946-1947?

A. I might cor[illegible]ect that. I was talking about H. B. 246, and it was ruled out this morning. I have gone into those proposals, and that was ruled out, and I didn't go into it.

Q. Up to that time, and Senate Bill 140 that has passed, all of your testimony has been what has happened in the past?

A. Yes.

Q. You have read Senate Bill 140, the provisions setting up the new Texas State University for Negroes, have you not?

A. Yes, I have read it. I wouldn't want to have to quote it, or give the substance of it.

Q. You have, I suppose, in making your survey as to what is available down here in Texas for Negroes, you have made a survey of Houston College in Houston for Negroes, have you not?

A. No, I haven't. You mean a personal survey?

[fol. 460] Q. Or the kind of survey which you made from the books of all of the other schools you have testified about?

A. Houston College was included in some of the material which I gave. For example, I gave the number of students who had Master's Degrees and doing graduate work at Houston College.

Q. I heard you mention Houston College once. When you were figuring the funds the State put into State schools for Negroes in Texas, you didn't include any money spent by the State on Houston College, did you?

A. Yes, '43 or '44.

Q. On Houston College. You have not examined those facilities of Houston College, the buildings and the 53 acres of land, have you?

A. No, I have not.

Q. I believe the amount of money that you gave as having been appropriated by Senate Bill 140 to maintain the new university and its various branches as one million dollars?

A. For current expenses, it was five hundred thousand dollars for two years, which would make one million dollars. I believe that is correct.

Q. Did you read the text of the bill where other funds were made available?

A. Yes, I took that into account. As I counted it up, there were $3,350,000.00 made available for various and sundry purposes for Negro higher education.

[fol. 461] Q. Actually, then, it was $1,350,000.00 for maintenance and support, instead of one million, wasn't it?

A. There were some items in there about Prairie View, something about some other institutions. It was scattered so through the bill it was practically impossible to tell exactly where the money was going, or how it was to be used.

Q. You mean impossible for you to tell?

A. Yes, for me to tell.

Q. You could tell the bill provided for two million dollars for the establishment of the University?

A. Yes, and I took that into account.

Q. At the beginning didn't you say Prairie View was the only separate Negro College maintained by State funds in Texas?

A. I think I did that.

Q. And wasn't quite a bit of your testimony based on Prairie View being the only State supported Negro college in Texas?

A. Not throughout.

Q. But quite a bit of it?

A. Here is what I understand, if I may explain. Up until 1945 I understand the Houston College for Negroes was a municipally owned and controlled institution. Around 1946, I understand it changed to some other status, which I couldn't find. I have taken into account the State's appropriation to Houston College for Negroes up until that time.

Q. In giving your total amount of money appropriated [fol. 462] by the State for 1945-1946 school years, that was a figure of $72,790,000.00. You itemized it; look at your figures there. Did you put Houston College in it?

A. No, sir.

Q. You allowed no money in there for Houston College?

A. No, nor did I have any for Texas Tech or the University of Houston.

Q. I asked you about Houston College. You can get that in some other way.

A. Pardon me.

Q. You can make a note of it so that you can ask him. Do you know whether or not these amounts of money appropriated to Negro schools in Texas were sufficient to operate those schools in accordance with the number of students who applied to go to them? Do you know that of your own knowledge or not?

A. Looking at Prairie View—how about Prairie View? The amount of money that Prairie View had, or even if you gave them all of the money appropriated under S. B. 140, it wouldn't be sufficient to operate it on the basis on which it is supposed to operate.

Q. Do you have the total figures on how many white students attended college in Texas during the years you have testified about on Negro students?

A. You mean total students?

[fol. 463] Q. Total number of white students attending Texas colleges during the years you have testified about on Negro students?

A. I think I have Negro students.

Q. I am talking about State supported schools.

A. 19—what is it, 1945-1946, that we are talking about now?

Q. You gave several years. Let's take that one to begin with. You gave the total number of Negro students?

A. At Prairie View there were 1,576 students in 1945-1946.

Q. And how many students were attending all of the other State supported schools for whites?

A. I could not tell you that. I can tell you some of the other institutions.

Q. You have the available books for that, do you not?

A. I suppose you could get it from the catalogue, or some place of that sort. All of them aren't available.

Q. In other words, you have drawn no comparison as to the total number of white students as compared to the total number of Negro students in making your financial comparisons, have you?

A. No.

Q. The ratio you have used is strictly a ratio of State funds appropriated as compared with population of Negroes compared to the total population of the State; right?

A. That is correct, and——

[fol. 464] Q. That is the ratio you testified about here under your point number one on the amount of funds, and the ratio you have used all along here in determining the percentage that the Negro Schools would have been entitled to under said ratio; right?

A. Yes.

Q. You have not applied in this case the ratio of students

attending, white students attending, as compared with Negro students actually attending school in the State, have you?

A. Yes, but not all of the State, if I may explain, Your Honor.

Q. Let me get my question. As I understood it a minute ago, you haven't even drawn the total of the white students attending State supported institutions for any one year you have testified about, have you?

A. That is right.

Q. Then you have not arrived at the ratio of expenditure, a ratio fixed by the number of white students attending school, total number attending State institutions as compared with the total number of Negro students attending, have you?

A. No.

Q. You mentioned a minute ago on direct examination Meharry Medical School in Tennessee, did you not?

A. Yes.

Q. You offered Meharry as an example of a medical school in Tennessee which was operating, and caused the [fol. 465] State of Tennessee to be far ahead of the State of Texas in the number of doctors and dentists per Negro—per so many hundred Negro population; right? Meharry is a separate Negro school, is it not?

A. Yes.

Q. Are you acquainted with the—what is the name of that senior college survey that you have in your pocket?

A. The Senior Colleges for Negroes in Texas.

Q. May I borrow it a minute? Are you acquainted with the Chairman of the Committee of this study, Dr. T. S. Montgomery, professionally?

A. No, I am not.

Q. Are you acquainted professionally with the reputation of Dean Pittenger?

A. I know his reputation.

Q. Is he a recognized authority in the same field in which you work?

A. You mean in racial comparisons?

Q. No, as an educator. You know his standing in the field of education, do you not?

A. He is the Dean of the School of Education at the University of Texas.

Q. You quoted several places from this book, from this study made by that committee, the Biracial Committee which studied senior colleges for Negroes. I will ask you [fol. 466] if, in your opinion that committee was, working over the long period of time that it worked to compile this volume, I will ask you if you do not believe they were in a better position to find out what is best for equality for the Negro students of this State, and in better position than you are from your short study of this particluar State?

A. I doubt if I could answer that. As I said a moment ago, I have given five or six weeks of intensive study to this subject. I don't know how much time they gave to the study which is involved there.

Q. I would like to read you a conclusion from that study, and ask you whether or not you agree with it. On page 83 of the study that you have been reading from:

> "Admission of Negroes to existing State universities for whites is not acceptable as a solution of the problem of providing opportunity for graduate and professional study for Negroes, on two counts: (1) Public opinion would not permit such institutions to be opened to Negroes at the present time; and (2) even if Negroes were admitted they would not be happy in the conditions in which they would find themselves."

I will ask you whether or not, first, you feel like you are in a position to agree or disagree with the conclusion therein drawn after having made only five weeks' study of [fol. 467] the matter in Texas?

A. I should say that I do not have enough facts to evaluate that opinion. I would want to know, have you made a poll of opinion of the people in Texas, number one. I would question the assumption underlying the statement, namely; that even if the poll showed that the opinion might be different, or it might be divided 60 to 40, or something of the sort, I don't think that is sufficient justification in itself in arriving at this conclusion, so I am not in a position to agree with the opinion, because you do not have enough facts stated there.

Q. In other words, that is the point I am going to get to. The men who have made a longer study, and have more facts at hand on which to arrive at the opinion as to what

can best furnish equality in Texas on this subject are certainly in a better position than you to judge the matter

Mr. Marshall: The question assumes that they had more opportunity, and had more facts.

The Court: I think it is rather sustaining himself, or failing to sustain himself, anyhow. He is probably going to recommend himself, if he testifies. I would.

Mr. Daniel: I doubt that he will.

The Court: An answer to that would either be to say that what you have been saying is well founded or it isn't well founded.

[fol. 468] A. Well, what I have been saying is well founded.

By Mr. Daniel:

Q. In your opinion?

A. In my opinion.

Q. You read from this book here on several occasions, did you not, as to the study made by these men?

A. Yes, sir.

Q. Aren't you willing to admit, Dr. Thompson, that from the long study that they made on this matter over a period of years, if the evidence shows it took them a period of years, won't you admit they are in better position to judge what is best for the equality of opportunities?

A. I don't want to appear immodest, Mr. Attorney General, or facetious, but I doubt it seriously. I have been in this field of race relations for some 25 years. Most of the difficulties involved in the situation are this; that we imagine things will happen. There has been no test to determine whether or not—in fact, there has been a test, I understand, if you will allow me to give a hearsay example.

Mr. Marshall: No.

A. The attorney says no, but there has been no test to determine whether or not the time is ripe or not, as they say. I think so, coming in the State from other states, and that sort of thing, but I wouldn't say at all that I have any more basis for my opinion than they have for theirs

Q. I will ask you again whether or not you are willing [fol. 469] to admit these gentlemen, after years of study, if the evidence shows they have had years of study, would be

in a better position to arrive at conclusions than you, after your five or six weeks in Texas?

A. I would have to know what they studied.

Q. I thought you had been reading it?

A. Yes, I picked out facts, and not conclusions.

Q. That is all.

Redirect examination.

Questions by Mr. Marshall:

Q. Dr. Thompson, you were questioned about this conclusion in this study of senior colleges for Negroes in Texas that "even if Negroes were admitted they would not be happy in the conditions in which they would find themselves." You have already testified you were born in Mississippi. Is that right?

A. That is right.

Q. Subsequent to that time you went to the University of Chicago, after attending a Negro school in Richmond, Virginia; is that correct?

A. That is correct.

Q. And the University of Chicago has all races; is that correct?

A. Yes, sir.

Q. You were in classes with other students of other races?

A. That is correct.

[fol. 470] Q. What I want to ask you is, did you find that you "would not be happy in the conditions in which you found yourself?"

A. No, I wasn't more unhappy; in fact, I was happier at the University of Chicago than I was at Virginia Institute.

Q. You can testify to that of your own knowledge, can't you?

A. That is correct.

Q. The faculty at Howard University, is it restricted to one race, or is it all races?

A. All races.

Q. Is there any unhappiness among them?

A. Well, I don't suppose any more than the average faculty, in any university.

Q. On these studies showing that Negroes in the north who attend southern universities, is there any showing as to how long those Negroes were in the north before they went back south?

A. I don't know of any—I can't recall any information now.

Q. What is your experience at Howard University as to students who come from most of the separate Negro schools in the south, as to their ability to shape up?

A. They have pretty weak backgrounds, on the whole. I mentioned a case this morning, in the case of chemistry, where one of the chemistry departments of the Negro college doesn't have physical chemistry. They come to Howard University to take graduate work, and they have to take a [fol. 471] year of physical chemistry before they can begin the graduate work. You face deficiencies in any of them.

Q. Isn't it true that many of the Negroes from southern schools are ineligible to attend a northern university; isn't that true?

Mr. Daniel: You are asking a leading question. We ask that you not lead him

By Mr. Marshall:

Q. Are there any Negro schools in the south that are unaccredited?

A. Yes.

Q. Can you get into an accredited university in the north if you come from an unaccredited school?

A. You can get in, but you are conditioned.

Q. Does a condition mean that you have to do more work?

A. Yes. My own personal experience bears that out. I got a Bachelor's Degree at Virginia University, and when I went to the University of Chicago, I had to do more work to get another Bachelor there.

Q. And you had already been to some kind of an academy in Mississippi, hadn't you?

A. That is right.

Q. Now, as to your experience in examining the relationship between the education in white and colored schools, on the question that was asked you on cross-examination as to one applicant to a law school, I want to ask you if, in your [fol. 472] opinion, what, in your opinion, would be the same viewpoint of a governmental agency as to that one pupil applying for a law school——

Mr. Daniel: We object to that. That would be a conclusion of the witness.

The Court: I don't see what a governmental agency would have to do with it.

Mr. Marshall: I am speaking of the University of Texas, with the University of Texas, with one Negro student applying for the law school, and the duty of the University to conserve the funds of the taxpayers.

A. I believe it would be the same answer that I gave the Attorney General when he asked me the same question a while ago in a different form. It seems reasonable the student should be admitted to the University of Texas.

Q. The question was asked whether or not Meharry was a Negro school. You testified on direct examination as to both Meharry and Howard. I now ask you whether or not Howard is a mixed school, or a Negro school?

A. Howard University has no restrictions as to race. In fact, we have all types of races at Howard. At least, they have had during the 20 years that I have been there.

Q. Getting back to this question of comparing the schools, the population of schools, is the population of the school—[fol. 473] what determines the number of students a school can accom-odate?

A. Well, there are a number of things. Of course, your physical plant, the things I enumerated this morning, physical plant, the number of teachers you can get, the number of facilities that you can offer.

Q. Even assuming that they are doing no better job than they are doing right now, could Prairie View accom-odate any more students?

A. I doubt it. I was there last week, and I understand they are overcrowded.

Q. As to library facilities, you did compare Meharry as to individual schools and student body?

A. Meharry?

Q. I mean Prairie View.

A. Yes.

Q. And are you familiar with the approximate size of the State of Texas—are you not?

A. I thought I was until I came here. I doubt it.

Q. What relationship to the number of students attending college is it to the fact that in one instance you have eleven schools scattered all over the state and in the other instance you have one school at the far—one of the far sides of the state?

A. Of course, geographically, it would be difficult, if [fol. 474] Negroes lived on the other side of the state, and would have to come to the other side of the state.

Q. Does that have some determinative bearing as to the number?

A. It probably would.

Q. That is all.

(Witness excused.)

The Court: We will take a recess for a few minutes.

Court was recessed at 3:15 p. m., until 3:40 p. m., May 15, 1947, at which time proceedings were resumed as follows:

Mr. Daniel: It is agreed that the following publications may be marked by the Court Reporter and left with him, and that he shall place in the record excerpts from such publications that may be requested by either of the parties.

Mr. Durham: We want to be bound only by what portions we offer.

(Thereupon, the following publications were marked for the purposes above stated as:)

(Exhibit A, 16th Census of the United States, 1940.)

(Exhibit B, Accredited Higher Institutions, 1944, Bulletin 1944, No. 3, U. S. Office of Education.)

(Exhibit C, General Studies of Colleges for Negroes, Misc. No. 6, Vol. II, U. S. Office of Education.)

[fol. 475] (Exhibit D, Directory, Colleges and Universities offering Graduate Courses leading to Master's and Doctor's Degrees, 1940-1945.)

(Exhibit E, Federal Government Funds for Education, 1944-1945 and 1945-46, Leaflet No. 77.)

(Exhibit F, Biennial Survey of Education in the United States, 1942-44, Statistics of Higher Education, 1943-44.)

(Exhibit G, Biennial Surveys of Education in the United States, 1938-40 and 1940-42, Statistics of Higher Education, 1939-40 and 1941-42.)

(Exhibit H, Biennial Survey of Education in the United States, 1942-44, Statistics of State School Systems, 1943-44, Chapter II.)

(Exhibit I, Federal Security Agency Biennial Survey of Education, 1936-1938.)

(Exhibit J, Statistics of Land Grant Colleges and Universities, year ended June 30, 1944.)

Mr. Daniel: We wish to take one in this group from which we read excerpts in the case.

Mr. Durham: We object, first, that it hasn't been certified to, and that nobody has identified it as being the official document.

The Court: Well, I think I will let him offer it, as the Doctor has testified from it.

(Said instrument, the same being National Survey of the Higher Education of Negroes, a Summary, Misc. Vol. [fol. 476] IV, was admitted in evidence as Respondents' Exhibit No. 15.)

Mr. Daniel: Number sixteen will be the Report of Senior Colleges for Negroes. We will get that from Dr. Thompson tomorrow.

(Said instrument, being "The Senior Colleges for Negroes in Texas," was admitted in evidence as Respondents' Exhibit No. 16.)

Donald G. Murray, a witness produced by the Relator, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Marshall:

Q. Give your full name.
A. Donald G. Murray.
Q. And your address?
A. 424 Y Court, Baltimore, Maryland.
Q. Your present occupation?
A. Attorney.
Q. Where did you go to college?
A. Amherst College.
Q. Where is that?
A. Amherst, Massachusetts.
Q. When did you finish Amherst?

A. 1932.

[fol. 477] Q. And did you apply for admission to the University of Maryland Law School?

A. I did.

Q. First; and what happened to your application?

A. It was refused.

Q. On what grounds?

A. On the grounds it was against the policy of the State of Maryland to admit Negroes to the University of Maryland Law School.

Q. What happened thereafter?

A. I consulted briefly with attorney Thurgood Marshall.

Mr. Daniel: We object to that as being irrelevant and immaterial, as to how he got in the school.

The Court: Tell me your purpose of it. I don't quite see.

Mr. Marshall: The whole purpose of it is that in the State of Maryland they have segregation statutes similar to the State of Texas. He was refused admission, and a lawsuit was filed, and they said if he was admitted to the school it would wreck the University, and he was admitted, and everybody got along fine.

The Court: How is he going to prove what the State said except by hearsay?

Mr. Marshall: We have here a document from the Court of Civil Appeals, and motion to advance a case, signed by [fol. 478] the Attorney General, and the Assistant Attorney General, from the State of Maryland. That is the only piece of evidence we are going to introduce in evidence as to what the State of Maryland said.

The Court: Might not that be the attorney's contention?

Mr. Marshall: He was representing it as the official attorney of the State of Maryland.

The Court: I will let you have it on your bill. You can offer it on your bill.

Mr. Marshall: Thank you, sir.

By Mr. Marshall:

Q. Was a lawsuit filed as a result of your case?

Mr. Daniel: We object to that.

The Court: It is on his bill.

Mr. Daniel: The records would be the best evidence.

The Court: He can say whether it was filed or not.

By Mr. Marshall:

Q. Did the Court of Appeals of Maryland in a decision reported in the official documents of the Court of Appeals of Maryland, and reported in the Atlantic Reporter, the title of which was Pearson against Murray, decide upon the case of which you were speaking?

A. Yes, it did.

Q. Now, I ask you as to whether or not you were admitted to the University of Maryland prior to the decision of the [fol. 479] Court of Appeals of Maryland?

A. Yes, I was.

Q. And prior to the decision of that case, I will ask you, did the Attorney General in Maryland, Herbert R. O'Conor, and the Assistant Attorney General, Charles T. LeViness, III, file a certain document with the Court of Appeals of Maryland concerning your case?

A. Yes, they did.

Mr. Daniel: As I understand it, all of this is going into his bill of exceptions?

The Court: That is right.

By Mr. Marshall:

Q. I show you this document entitled Raymond A. Pearson, President, and other names, versus Donald Murray, in the Court of Appeals of Maryland, with the certification from the archivist of the State of Maryland, and ask you if you can identify it?

A. Yes, I can.

Q. What is it?

A. It is the notice to advance the hearing in the Court of Appeals of Maryland on the case Pearson, et al. vs. Murray.

Mr. Marshall: If Your Honor please—you still have your objection to it?

Mr. Daniel: Yes, my objection is already in, and the Court sustained it.

The Court: Yes, and it is coming in on the bill of excep- [fol. 480] tion.

(Thereupon counsel for relator had the Reporter mark said instrument above referred to as Relator's Exhibit

No. 7, and same was admitted for the purpose of the Bill of Exception as such exhibit.)

Mr. Marshall: Thank you, sir.

Q. Mr. Murray, the sum and substance of the relator's Exhibit No. 7 is the request to the Court of Appeals of Maryland to advance the hearing in this case from the October term on the theory that if you were admitted that dire results would come about at the University of Maryand; is that not correct?

A. That is correct.

Q. You were admitted in September, 1935, were you not?

A. That is correct.

Q. Will you tell briefly to the Court what, if anything, happened to bear out the predictions of the Attorney General of Maryland?

A. Absolutely nothing happened.

Q. Were you ostracized in any way?

A. No, I was not.

Q. Were you segregated in any way?

A. No, I was not.

Q. Were you mistreated in any way?

A. No, I was not.

Q. What was your experience, briefly?

[fol. 481] A. My experience, briefly, was that I attended the University of Maryland Law School for three years, during which time I took all of the classes with the rest of the students, and participated in all of the activities in the school, and at no time whatever did I meet any attempted segregation or unfavorable treatment on the part of any student in the school, or any professor or assistant professor.

Q. Where is the University of Maryland Law School located?

A. Baltimore, Maryland.

Q. Are the public schools there mixed or separate, according to race?

A. Separate.

Q. Are housing conditions mixed or separate?

A. Separate.

Q. Are eating facilities mixed or separate?

A. Separate.

Q. With the exception of the separation of races on buses and trolley cars here in Austin, do you find any item of segregation that is not present in Baltimore, Maryland?

A. As far as I have observed, I have observed none.

Q. Attorney General Herbert O'Conor signed this motion to advance, did he not?

A. Yes.

Q. Who gave you your diploma when you graduated from the University of Maryland?

[fol. 482] A. Governor O'Conor.

Q. The same man?

A. Yes.

Q. And Charles T. LeViness, III, signed that motion as Assistant Attorney General?

A. Yes.

Q. Who gave you your first job when you left the law school?

A. Charles T. LeViness, III.

Q. How did that come about?

A. I applied for a position as inspector with the Board of Liquor License in Baltimore City. At the time Mr. LeViness was the Chairman of that Board, and in charge of the hiring of applicants. I applied and was accepted and worked for about eight months with him.

Q. And then you went to the Army?

A. No, I went in private practice.

Q. Do you know of your own knowledge whether other negroes have attended the University of Maryland since your time?

A. Yes, I do.

Q. About how many are in there now?

A. Nineteen.

Q. Has there been any trouble of any kind since you have been there that you know of?

A. Not that I know of.

Q. Your witness.

[fol. 483] Mr. Daniel: That is on the bill of exception. No questions.

(Witness excused.)

Mr. Durham: Your Honor, we desire to offer a portion of the cross interrogatories of the witness L. E. Angell, and

I will ask Mr. Nabrit to read the answers as I read the questions.

(Mr. Durham read the following cross interrogatories, and Mr. Nabrit read the answers, from Deposition of E. L. Angell.

E. L. Angell (Deposition):

Q. 3. How much money was expended in setting up this Law School for Negroes in Houston?

A. 3. I do not know.

Q. 4. Were books, equipment and supplies for this Law School for Negroes in Houston purchased for cash or by State requisition or vouchers?

A. 4. They were purchased by Prairie View University using their funds.

Q. 5. If purchased for cash, who paid for them and out of what fund was the money secured and on whose authority was the payment made?

A. 5. They were paid for from funds of Prairie View [fol. 484] University and on the authority of the Principal of the Prairie View University.

Q. 20. How many rooms were there in this building or in these housing facilities and what was the floor area of each?

A. 20. There was a suite of three rooms, but I do not know the floor area.

Q. 30. State what was the academic rank of each of these teachers in the faculty of the Law School.

A. 30. I do not know.

Q. 32. How many lecture rooms or class rooms were provided in this building or in these housing facilities and what was the floor area of each? For identification purposes, number this room or rooms.

A. 32. I do not know the disposition to be made of the suite of rooms that was rented.

Q. 33. Was an office for the Dean provided in this building or in these housing facilities? If so, what was its floor area and its approximate distance from the lecture rooms? For identification purposes, number this room.

A. 33. I do not know.

Q. 34. Was an office for the registrar provided in this building or in these housing facilities? If so, what was its

area and its approximate distance from the lecture rooms? For identification purposes, number this room.

A. 34. The registrar for this court was the Registrar at [fol. 485] the Prairie View University, and I do not know if they provided any space in Houston for him or not.

Q. 36. Into how many rooms was this Law Library divided and what was the floor area of each? For identification purposes, number each of these rooms.

A. 36. See answer to Cross Interrogatory No. 35.

Q. 37. What was the floor area of the main reading room in the Law Library? For identification purposes, number this room.

A. 37. See answer to Cross Interrogatory No. 35.

Q. 38. What was the floor area of the cataloguing and receiving room of the Law Library? For identification purposes, number this room.

A. 38. See answer to Cross Interrogatory No. 35.

Q. 39. Was there a librarian's office in the Law Library, if so, what was its approximate distance from the main reading room?

A. 39. See answer to Cross Interrogatory No. 35.

Q. 40. What was the approximate distance of the Law Library from the lecture rooms, the Dean's office and the registrar's office?

A. 40. See answer to Cross Interrogatory No. 35.

Q. 41. When was this library purchased and what was its purchase price?

A. 41. Some 400 basic reference law books were made [fol. 486] available by the Texas A. & M. College library, and it was ascertained that books for first year law students, a list of which, was furnished by the Dean of the Law School of the University of Texas, could be delivered on short notice, and the authorities of Prairie View were ready to purchase these books if a student registered in the law course.

Q. 42. How many library stacks or book cases were acquired and what kind?

A. 42. These were to be furnished by the library of Prairie View University.

Q. 45. Give the name and qualifications and salary of each of these officers of the Law School for Negroes in Houston: (a) Dean; (b) Registrar; (c) Librarian.

A. 45. The Dean and Registrar were officials of Prairie View University and Prairie View University was to furnish Librarian services at the Houston establishment.

Q. 48. Give the budget for the Law School in Houston for Negroes for the first year. Itemize as follows:

(a) Salaries—Instruction.

(b) Library.

(c) Operation and maintenance.

(d) Travel.

[fol. 487] (e) Publication.

(f) Equipment.

(g) Supplies and expenses.

(h) Administration.

(i) Scholarships and student aid.

(j) Annuities.

A. 48. No specific budget was approved, it being understood that if a student registered for the law course that the officials at Prairie View would then submit a budget.

Q. 50. State whether announcements of the new school, its curriculum, its schedule of classes, its organizations, expenses and program was made. If written announcements were made, attach copies of the same to this deposition.

A. 50. The only announcement that I know was made by the press.

Q. 51. If oral, who issued them and how were prospective students to become aware of these verbal announcements?

A. 51. I do not know.

Q. 52. What officer of the Law School for Negroes in Houston made these announcements?

A. 52. I do not know.

Q. 53. Did the faculty of the School of Law for Negroes in Houston prepare the curriculum, schedule the classes and otherwise conduct the general educational work of the Law School?

A. 53. It was understood that they would follow the course [fol. 488] offerings of the University of Texas.

Q. 54. How many meetings did the faculty of the Law School for Negroes in Houston hold. Attach copies of the minutes of these meetings to this deposition.

A. 54. I do not know.

Q. 55. Who was the Secretary of the Law School for Negroes in Houston. State the qualifications of the Secretary.

A. 55. Prairie View University was to furnish secretarial assistance for the law course in Houston. I do not know the qualifications of the personnel.

Q. 56. Attach copies of the application blanks or forms for admission to the Law School for Negroes in Houston to this deposition.

A. 56. I have no copies, blanks or forms.

Q. 57. Attach copies of each of the registration forms, blanks or cards used by the Law School for Negroes in Houston.

A. 57. The registration forms would be those of Prairie View University. I haven't these forms available.

Q. 58. Is this Law School for Negroes still in existence in Houston?

A. 58. The facilities were rented until the 1st of March. It was understood that if no student registered that the authorities of Prairie View would discontinue the offering of the course and made disposition of the equipment.

[fol. 489] Q. 59. If not, when was it closed and upon whose authority was it closed?

A. 59. See answer to Cross Interrogatory No. 58.

J. B. RUTLAND, a witness produced by the Relator, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Marshall:

Q. Give your full name, please.

A. J. B. Rutland.

Q. And your address?

A. 4112 Duval.

Q. And your occupation, sir?

A. Director of Education for Negroes, State Department of Education.

Q. And do you also have a position with the Scholarship Committee for Negroes?

A. Executive Secretary of the Scholarship Committee.

Q. And what is the Scholarship Committee for Negroes?

A. It provides for out of state scholarships, scholarships to out of State institutions for Negroes in subjects that are not offered at Prairie View.

Q. And when was that committee set up?

A. In 1939.

[fol. 490] Q. And how much money did it have to operate on the first year?

A. Twenty-five thousand.

Q. And was that all for scholarships, or was part of that for administration?

A. Part of it for secretarial.

Q. Approximately how much was available for scholarships?

A. About twenty-four hundred the first year.

Q. Twenty-four hundred?

A. Twenty-four thousand the first year.

Q. And was that all contributed?

A. I am not sure about the first year. I wasn't in the office at that time.

Q. When did you take over?

A. 1945.

Q. 1945?

A. Yes.

Q. Do you have the records there for the previous years? Will you look at those records and let us know how much was actually expended in 1939? I am wondering if we might shorten this by giving him time to consider each year. The thing I am interested in is the amount of money and the number of subjects that were covered by the students, and the students for each year, and then he could present that. Do you have it?

A. I have it for 1945-46 here.

[fol. 491] Q. We wanted it back a little ways, if we could. Do you have any other years there? Well, I think, if Your Honor please, I might ask one more question, and I might save you some time there. Is this 1945-1946 about the way it has been running since you have been there?

A. Since I have been there, it is.

The Court: That is the one since you have been there, isn't it?

A. Yes.

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By Mr. Marshall:

Q. Do you have a copy of the rules and regulations for the issuance of scholarships that you mail to the pupils?

A. No.

Q. Is this it?

A. That is right.

Q. That is it. May we have these two marked?

A. 1943 and 1944 there was $24,000.00 spent.

Q. How many law school students were included in that year?

Mr. Daniel: Your Honor, we would like to make the same objection to this line of testimony that we made to the previous testimony about other schools. The relator here is asking only the Dean and the Registrar and the Board of Regents of the University of Texas to get into the University of Texas. He isn't concerned at all with out of state scholarships, didn't want one, and didn't apply for one. We [fol. 492] think it is irrelevant and immaterial to this case.

The Court: We will hear the testimony.

Mr. Daniel: Note our exception.

By Mr. Marshall:

Q. Can you tell me how many law school students went in the year 1944-1945?

A. Three.

Q. And the previous year, can you go back?

A. The total up to now is 11, since we have started.

Q. The total is 11 in law schools?

The Court: Altogether.

A. Altogether since the work started.

By Mr. Marshall:

Q. When was the first year you had an applicant for a law school scholarship?

A. In this 1939 to 1943 report we have eight law students.

Q. You have eight law students in that report. You don't know what years they applied, do you?

A. No, except during the years 1939 to 1943.

Q. All right. Can we have the—is that a mimeographed copy, or is that the only one?

A. I have only the one copy.

Mr. Marshall: Any objection?

Mr. Daniel: The same objection we made to all of them.

Mr. Marshall: We are introducing as Exhibit 8 the report of the Scholarship Aid Fund for Texas Negro Graduate and Professional Students, 1945-1946.

[fol. 493] (Said instrument was admitted in evidence as Relator's Exhibit No. 8.)

Mr. Marshall: And Relator's Exhibit No. 9, from the office of the Executive Secretary of the Texas Scholarship Aid Committee, State Department of Education, statement of policy and procedure. That is applicable, of course, to the Negro Scholarship Fund.

(Said instrument was admitted in evidence as Relator's Exhibit No. 9.)

Mr. Marshall: That is all.

Mr. Daniel: No questions.

(Witness excused.)

Mr. Durham: Your Honor, the relator rests at this time, with the understanding, because of the order in which the testimony has been put on, he reserves the right to rebut any further testimony, under the agreement.

The Court: All right.

Mr. Daniel: Your Honor, I want to exchange the smaller picture for a larger picture, more equal to the size of the picture of the University Law School introduced by the relator, for this little picture we introduced yesterday.

Mr. Marshall: We only object on the ground there is too much sky in it.

Mr. Daniel: For the record, in reply to that last remark, [fol. 494] we tried to take it about the same distance as the one introduced by the relator of the Texas University Law School.

(Said photograph was marked by the Reporter as Respondents' Exhibit No. 14, and same is substituted for the instrument originally introduced as such exhibit.)

HENRY DOYLE, a witness produced by the Respondents, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Daniel:

Q. State your name.
A. Henry Doyle.
Q. Where do you reside?
A. 1205 Leona Street.
Q. Austin, Texas?
A. Austin, Texas.
Q. Did you reside here in Austin during the months of February and March of 1947?
A. I did.
Q. Were you acquainted with the opening of a Negro Law School here in Austin on March 10, 1947?
A. Yes, sir.
Q. Did you, prior to March 10, 1947, consider entering [fol. 495] that law school?
A. I did.
Q. Did you on the Saturday before March 10, 1947, attend a meeting in Dallas, Texas?
A. I did.
Q. Were other members of the Negro race at that meeting?

Mr. Durham: Your Honor, the relator objects as to whether a meeting was held, or ten thousand meetings were held, unless it is shown they were held at the request and instance of relator.

The Court: We will see how it develops.
Mr. Durham: Will you note our exception?
The Court: Well, I haven't ruled on it yet.
Mr. Durham: All right, Your Honor.

By Mr. Daniel:

Q. Do you know Maceo Smith?
A. I do.
Q. What position, if any, does he hold with the National Association of Colored People.

Mr. Durham: Your Honor, we object to that. Any connection he has with the National Association for Colored

People would not be binding, and any action he did would not be binding upon this relator.

The Court: I believe we will let him pursue it a little further.

A. State the question again.

[fol. 496] By Mr. Daniel:

Q. What position does he hold with the National Association for the Advancement of Colored People?

A. I am not familiar with his title.

Q. Is he an officer in the Association?

A. I am not sure. I know he works with them, but whether he holds an office or not, I don't know.

Mr. Durham: We object to the last statement as not responsive.

The Court: Yes, just answer the questions.

By Mr. Daniel:

Q. Was he at that meeting attended by you in Dallas on the Saturday before March 10, 1947?

A. He was.

Q. Did he make a talk or report of any kind at that meeting in Dallas the Saturday before March 10, 1947?

The Court: I am still holding that in abeyance.

A. Again, will you ask it again, please?

By Mr. Daniel:

Q. Did—first, let's get this. Maceo Smith, was he at the meeting in Dallas?

A. He was.

Q. Did he make any kind of talk or report there at the meeting?

A. I don't recall.

Q. Were discussions held at the meeting by——

Mr. Durham: Your Honor——

Mr. Daniel: I withdraw it.

The Court: I think it would be hearsay.

[fol. 497] By Mr. Daniel:

Q. How long did you stay there at the meeting in Dallas?

A. I am not sure, approximately two hours.

Q. Were other officers of the National Association for the Advancement of Colored People there?

Mr. Durham: We object to that as assuming that he knows them.

The Court: Unless he knows of his own knowledge.

Mr. Durham: We object to it for the reason that he presupposes that he knows, and it is an assumption not based upon any facts.

A. I do not.

By Mr. Daniel:

Q. You do not know. What was the name of the group that held that meeting?

Mr. Durham: We object to that as assuming that he knows.

The Court: If he knows.

A. I do not know.

By Mr. Daniel:

Q. Who notified you to come to the meeting?

A. I was notified by circular letter.

Q. From whom?

A. I don't recall the signature.

Q. Was the support of this lawsuit pending here by the National Association for the Advancement of Colored People mentioned at that meeting by anyone?

[fol. 498] Mr. Durham: We object to that.

The Court: Of course, it would not be admissible unless the relator was there, and unless he made it.

Mr. Durham: And unless it was by his authority, and we object to it as not being binding upon the relator, unless he shows that connection.

The Court: That is right.

By Mr. Daniel:

Q. Did you see Heman Marion Sweatt there?

A. I did not.

Q. Did you see Mr. Durham, the man that just made the objection, any time during that meeting?

A. I saw him.

Q. Did he appear before the meeting?

A. He did.

Q. Before that meeting concluded, did you announce to that meeting that you would not enter the law school, Negro Law School on March 10, 1947?

Mr. Durham: We object to that as being irrelevant and immaterial as to what he would do.

The Court: I believe I will let him answer it, in view of our prior rulings of that. We may strike it all later.

By Mr. Daniel:

Q. Did you make such statement to the meeting before it adjourned?

A. I said I was seeking information relative to making up my mind whether or not I would enter the law school.

[fol. 499] Q. Did you announce before the meeting was over that you would not enter the law school the next Monday morning?

A. I did not.

Q. Didn't you tell me that you did?

Mr. Durham: We object to him arguing with his own witness.

The Court: That is right.

By Mr. Daniel:

Q. Did you enter the Negro Law School on March 10, 1947?

A. I did not.

Q. That is all.

Mr. Durham: That is all.

The Court: I think the testimony is perhaps not relevant.

Mr. Durham: We ask that it be stricken.

The Court: All right.

Mr. Daniel: Note our exception.

(Witness excused.)

Mr. Daniel: That is all of the witnesses we have here now, Your Honor. We have two for in the morning. That is all we know about.

The Court: Then we will recess until nine o'clock in the morning.

(Court was recessed at 4:20 p. m., May 15th, 1947, until 9:00 a. m., May 16, 1947.)

[fol. 500] Morning Session, May 16, 1947, 9:00 A. M.

A. W. Walker, Jr., a witness produced by the respondents, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Greenhill:

Q. Will you please state your name?

A. A. W. Walker, Jr.

Q. What is your occupation, Judge Walker?

A. Professor of Law at the University of Texas Law School.

Q. Would you please give us your educational background for that teaching?

A. I received my B. A. Degree from the University of Texas in 1921 and my LLB in 1923. I took work at some other schools, graduate work at the Yale Law School, some extra graduate work at Columbia Law School.

Q. Do you belong to any professional societies?

A. Yes, the Association of American Law Schools, American Judicature Society, Texas Bar Association.

Q. Have you been admitted to the practice of law in Texas?

A. Yes.

Q. When were you admitted?

A. I was admitted in 1923.

[fol. 501] Q. State whether or not you have engaged in the private practice of law?

A. I have.

Q. When did you engage in the practice?

A. I practiced in Dallas, Texas, from 1923 to 1925.

Q. Would you state whether or not you have written any legal articles or books on the subject of law?

A. I have written quite a few articles published in law reviews and some in trade magazines.

Q. Would you please name some of the articles in the law reviews?

A. I wrote a series of articles on the subject of the law of oil and gas which were published in The Texas Law Review, one in the Mississippi Law Review, and various articles also published in the Oil & Gas Journal, and other trade publications.

Q. In what courts are you licensed to practice?

A. The Supreme Court of Texas, the Supreme Court of the United States, the Federal Court for the Northern and Western Districts of Texas.

Q. What subjects have you taught in the law school?

A. That is quite a long list. My teaching has been primarily in the real property fields. I have taught courses in personal property, real property, conveyances, called future interests, oil and gas, domestic relations, wills, administration of estates.

[fol. 502] Q. What courses are you now teaching?

A. At the present time I am teaching oil and gas and a real property seminar.

Q. What system of law instruction do you use in your classes?

A. The case book system.

Q. How long have you been using that system?

A. Since I have been teaching law, which is about 22 years.

Q. Would you please describe briefly the nature of the case book system?

A. The case book system is designed to cause your students to go to the primary sources of law, rather than to secondary sources of law for their information. In other words, they go to the decisions of the courts and study those and be prepared to recite upon them in class. and then to discuss them and the conclusion, with all questions that might be raised in regard to those cases.

Q. In addition to the—is there any additional feature of the system in addition to the recitation and discussion? Is there any other part of the case book system which you use?

A. I don't know that I understand your question.

Q. I mean, do you ever lecture to the class?

A. Oh, yes. I would not call that a part of the case book system, but frequently there is material that you don't think

that requires the detailed attention that the case book system necessitates, which you want the students to have, but [fol. 503] where you can cover the situation by simply a lecture covering that particular topic.

Q. I will ask you whether or not in your opinion the case book system is flexible?

A. A very flexible system.

Q. How many students are in your classes, Judge Walker?

A. Well, in my class in oil and gas at the present time, there is something over a hundred students. In my seminar class, it is restricted to fifteen.

Q. How often does an individual student get called upon to recite in a class of a hundred?

A. I would say that in a class of 100, for being called upon to recite on a case, that the average would not be called upon to recite more than one case.

Q. In what period of time?

A. During a course.

Q. Three and a half months?

A. Yes, about 100 cases. Possibly you might cover more than a hundred cases, but you wouldn't cover probably as many as 200 cases.

Q. So, as I understand you, an individual student would be called on——

A. About one and a half cases.

Q. One and a half times in a four and a half months course?

A. That is right.

[fol. 504] Q. Have you taught any smaller classes than 100?

A. Yes. Of course, at the present time I am teaching a seminar class which has fifteen students. In the past, before our law school got so large, in the summer time I suppose we had an attendance of about 150 students on the average, and the classes were relatively small. I have taught some of those classes where there were around 20 students to the class.

Q. And what system of teaching did you use in those classes?

A. The case book system.

Q. I will ask you whether or not you think such system is adaptable to a small class?

A. Yes, I think it is adaptable to a small class.

Q. Could it be used by a class of ten?

A. I think so, without question.

Q. Would the students in that class receive the same or similar experience and education as those in the class of 100?

A. In my opinion, they would receive better.

Q. Would you please explain that answer?

A. For the reason that they would be called upon more frequently. They would take a more active part in the discussions. In a class of 100 students, many of them, realizing that under the law of averages their chances of being called upon are rather remote, are inclined not to take an active part in the discussion. There is always a certain group of such students. In a class of ten, all of the students are on their toes all the time, because they realize [fol. 505] they are apt to be called upon next.

Q. Are you familiar with The Texas Law Review?

A. Yes.

Q. Have you been connected with the publication officially?

A. Yes, I was the first student editor in chief, and I have acted as faculty adviser on two different occasions, of the publication of the review.

Q. Do you know the nature of the legal existence of The Texas Law Review?

A. It was organized in cooperation with the Bar of Texas as a corporation, and stock was sold, and it exists as a separate legal entity, a corporation.

Q. Does it have any official connection with the School of Law?

A. Not officially, no.

Q. Who decides what articles may be published in the Texas Law Review?

A. The faculty adviser.

Q. I will ask you if in the past, and at the present time articles have been accepted by The Texas Law Review which have been written by students other than of the University of Texas, and faculty members of the University of Texas?

A. Yes. I assume that it is considerably more than half of the articles. We make a distinction in the Review in [fol. 506] what we call articles and comments and case notes.

Of the leading articles, more than half of them are prepared by outsiders. As to the comments, largely they have been prepared by our own students, but occasionally comments have been submitted by students of Baylor and S. M. U.

Q. Do you know whether or not Baylor has a law review in connection with its law school?

A. The last information I have on it, they do not have. I feel reasonably sure they have not organized it.

Q. Do you know whether or not the Baylor Law School is an accredited Law School?

A. Yes, it is an accredited law school.

Q. Now, if a member of the Negro Law School should prepare and submit an article to the Texas Law Review, of merit, I would ask you if there is any reason why that should not be published in the Texas Law Review?

Mr. Durham: We object to that as to whether or not there is any reason or not. It is too speculative, and not binding upon this relator. It has no bearing upon any issue.

Q. I will withdraw the question. Do you know of any rule of The Texas Law Review or society which would prohibit its use in the law review?

A. No, there is no such rule.

Q. Did you hear the testimony of Dean Harrison, from the stand?

[fol. 507] A. Yes, I heard it.

Q. Did you hear that portion of his testimony in which he cited with approval some sort of review, or otherwise, which divided law schools into large, medium size, and small?

A. Yes.

Q. Did you hear that portion of his testimony which intimated that the smaller schools would consist of schools wherein the student population was between 50 and 150?

A. Yes.

Q. Did you hear that portion of his testimony that the so-called smaller schools would be inferior in that they would not be in a position to offer equal educational advantages with larger or medium size schools?

A. Yes.

Q. I will ask you whether or not you know of any of the schools, law schools, that have a population of from 50 to 150 in their class rooms?

A. Yes, there are quite a few.

Q. Would you name some of those?

A. I couldn't give you the figures of their enrollment at the present time. Most of them, of course, as you realize, are crowded because of the present situation. Prior to the war, schools like Duke University and North Carolina University had on the average about 100 students. Stanford [fol. 508] University had approximately 150, I believe 148 in 1941—in 1940-41, was their attendance.

Q. Do you know the general reputation of these law schools?

A. The three schools I have named are outstanding law schools with very high reputations.

Q. Are they at least of equal reputation with the University of Texas?

A. Yes.

Q. Your witness.

Cross-examination.

Questions by Mr. Nabrit:

Q. Professor Walker, in stating the courses which you have taught and which you now teach, you stated that you have taught real property courses primarily?

A. That is correct.

Q. Personal property, conveyances, and one of oil and gas, administration of estates, and similar courses, and that in teaching those courses you used the case method of teaching?

A. That is right.

Q. You also stated that in your class of a hundred you called on each student probably once during the semester?

A. I said I called on them once for a principal case, once and a half, on the average, I would say.

Q. And you stated that you have approximately 100 principal cases during the——

[fol. 509] A. No, it would — a little larger than that, one and a half times, about a hundred and fifty cases, I would say.

Q. Yes. Now, is not one of the attributes of the case system that, as used by professors of law, that most of these principal cases are not covered by calling on the students,

but rather by, especially in the larger classes, by having the students volunteer? Don't you have that in your classes?

A. That isn't my system.

Q. Your system is to go by the roll on each principal case?

A. I call on a specific student for a case.

Q. Do you ever call on a student out of order?

A. I don't have a roll. I have a class seating chart with their names, and I skip from one seat to another, and the name of the student is there, so I never call on them in order.

Q. You skip about over your chart?

A. Over the room, yes.

Q. Do you have some number or some method of indicating when you have been in that particular spot last?

A. That is right.

Q. After you have called on that particular student, let's say student "A," for a principal case, let's assume first that "A" gives the case. Then do you throw that case open for discussion, or do you make your comment? Give us what procedure is next.

[fol. 510] A. Of course, a generalization is all you can do here. It depends on the case, largely. Sometimes it may be a relatively simple case, and the student may have handled it satisfactorily, and you may not get any further discussion. Normally, however, the subject will be thrown open for general discussion, and the students will ask questions and raise points and take different viewpoints about the case, and general discussions.

Q. So that if the student has some idea which he wants to present, or some question which he wishes to ask about that case, after this one student has given the case, he has that opportunity?

A. Yes.

Q. I will ask you, in the second place, in your courses, is each student supposed to brief these cases? I put it "supposed" because we understand then he is supposed to brief?

A. That is correct.

Q. So that if he has done that, and if he is called on he may recite from his brief?

A. I try not to let them recite from the brief.

Q. Let's say from his recollection of his work in briefing the case.

A. That is right.

Q. So that we have these 100 students supposedly having [fol. 511] done that spade work before they come, and one is chosen, and all participate?

A. That is right.

Q. Isn't one of the basic virtues of the case system just this, that spade work which all of the students do in preparing the case, and this wide discussion of getting the viewpoints of persons in the class who have a viewpoint. In future interests that may not be true, but over in oil and gas—that may not be true. Let's take personal property or domestic relations. There might be a wide variety of opinion. Isn't that one of the virtues of the case system, that comment and explanation and oral argument about the case?

A. Unquestionably that is one of the virtues, and the larger the class the more essential it is to have that, because, otherwise, you don't know whether your students are understanding the subject.

Q. That is right. Now, if you had one student in a class, obviously that student would have to do his spade work every day or he couldn't come? We agree to that, don't we?

A. He would get a very intensive course.

Q. So that he would get that side of his law training thoroughly examined every day?

A. Yes.

Q. But he would miss the discussion of other class mem- [fol. 512] bers, would he not?

A. He would. I think so, and it would be the province of the instructor to try to supply that by asking questions himself.

Q. But he begins to lose some of the merits of the system itself when he can't have this discussion which goes on in the class?

A. There is a certain value to that.

Q. Yes. Now, let's go from that just a moment to this law review at the University of Texas which has been—do you consider the law review at the University of Texas an extraneous and unimportant feature?

A. If I understand your question, extraneous—do you mean foreign to teaching in the law school?

Q. No, I mean as one of the assets of the University and a part of its reputation, and a part of its value to the student.

A. I think work on the law review is of value to the student.

Q. It is of such recognized value that it is a distinction to the student to state after he has graduated that he was a member of the law review staff, is it not?

A. That is correct.

Q. In the school it is an honor also to be known as one of the law review staff, is it not, for the student?

A. That is correct.

Q. Obviously, from the catalogue, the law review at the [fol. 513] University is incorporated, and I understand you to say that is a private corporation. Nevertheless, in your opinion, to all intents and purposes, is not the law review at the University of Texas under the supervision of the faculty and students at the University, in fact?

A. It is so long as the corporation permits it.

Q. I am assuming that they have not forbidden your supervision. It is to all intents and purposes under the supervision of the faculty and students?

A. That is true of the content that goes into the review; the financial end of it, no.

Q. I am just speaking of the control and operation of the law review as a legal publication, not as to its expenses or things of that sort. It is under the control and supervision of the faculty and students?

A. That is correct, although there is a Board of Editors of outstanding lawyers who are appointed each year.

Q. Yes.

A. By the stockholders.

Q. Yes.

A. Who would have, if they cared to exercise it, complete authority, I assume.

Q. Yes, but isn't it a matter of fact that they don't, they consider it an honor to be on there, and they leave it to the faculty?

[fol. 514] A. That has been the practice.

Q. There is nothing strange at the University of Texas in operating The Texas Law Review from the way it is operated at other institutions, is there? By that I mean all other institutions, or most of the institutions, the students write the case notes and comments. You have some other comments and you might have some other professors writing case notes for articles by members of the faculty and by distinguished lawyers and jurists all over the state; isn't that the way the Texas Law Review operates?

A. That is correct. It is different in that its set up is independent.

Q. I am not talking about the corporation; I am talking about your testimony that most of your leading articles, a great many of them, were written by lawyers and distinguished men in the legal profession who were not at the University of Texas, and that those comments were solicited from other persons than the students and faculty. That is not strange in law reviews, is it?

A. No.

Q. It is an accepted practice?

A. That is particularly true of our articles. I don't know that we have solicited any comments from outsiders, although they have been submitted and accepted. They were not solicited.

Q. So that it operates just like the Columbia Law Review where you were, as far as that goes?

[fol. 515] A. I don't know what the policy of the Columbia Law Review on accepting outside articles is, or what is the students' portion.

Q. I don't mean the students' portion. You have just stated the students would keep their portion, but Columbia accepts leading articles?

A. Yes, articles.

Q. So that you did not intend to give the impression that there is something peculiar about the way the Texas Law Review operated in that matter of articles?

A. No, not in regard to articles.

Q. Did you intend to give the impression about case notes?

A. Case notes, I think there is a difference there, and I use the word "think" because I am not qualified to speak on the rules that the law reviews have in that respect, but we do on occasions accept contributions for what we call the students' portion of the review, to the comment and case note section from outside sources. As a matter of fact, we accept them from our own students who are not on the editorial staff of the review. In that respect, I don't know what the policy of other reviews has been, but that has been our policy. We have accepted contributions from students at S. M. U. and students at Baylor.

Q. You spoke of Baylor a moment ago. What is the size of the law school at Baylor?

[fol. 516] A. At the present time?

Q. Yes.

A. They closed down during the war for want of students, and it was only reopened this fall. I am not sure what those figures are. It would be purely a guess.

Q. Would you mind guessing?

A. I would say 150 students.

Mr. Daniel: We object to the guess, Your Honor, because it is so far from the facts.

The Court: Of course, the guess wouldn't help any.

By Mr. Nabrit:

Q. In your opinion, Professor Walker, the law schools with 50 and 100 students, from your knowledge, do any of those law schools possess law reviews?

A. Well, the three schools I named all possess law reviews, Duke and North Carolina and Stanford. I haven't checked to see whether there were others. I did check those three schools.

Q. As a professor of law you are familiar with most of the law reviews, are you not?

A. I am familiar with most of the law reviews, but I wouldn't be familiar, offhand, with the number of students in the various schools.

Q. So you just know of these three schools?

A. I simply checked those, because I happened to know those were small schools, and did have good law reviews.

[fol. 517] Q. Do you know how those law reviews operate, of your own knowledge?

A. No, I don't.

Q. Now, your experience with your seminar of 15 students, you don't teach a seminar in the same way in which you teach your regular classes, do you?

A. No, I don't.

Q. So that it would not illustrate the case system?

A. Well, seminar courses are very flexible.

Q. Yes.

A. On some days we have two hour sessions, if needed, of the class, and sometimes we use the case book system on a certain topic, and other days we have students contribute their own research and discussion. It varies from class to class, the system we use.

Q. In your opinion, and as a law professor, would you advise a prospective law student to attend a law school where he would be the only student?

A. That depends, of course, on the law school, and the set up.

Q. This law school would be one that was just opening.

A. I would say that he would have an opportunity to get a wonderfully intensive course of study, being one student.

Q. After you said that, what would you advise him, as a law professor?

A. I believe I would.

Q. You would advise him?

[fol. 518] A. I believe I would. I don't know of any student that would ever have that much care and attention given to his education.

Q. You are assuming the care and attention. You don't think there is any value in having upper classmen in the law school, and you don't think it is of any value that he have discussion with fellow classmates?

A. There are values and values, and you have got a lot of balancing to do. In a large law school the student misses a great deal. There are a great many disadvantages in a large law school, a large class. There are certain advantages. In a small class there are many advantages, and there are certain disadvantages. I would say you would have a balance there. I don't think that a one-man class would be a very desirable class from the teacher's standpoint, but I think from the student's standpoint he would have a wonderfully intensive course of instruction.

Q. Well, you stated that it would not be advantageous for the teacher, and the teacher is the stimulating influence in a one-man law school, isn't he?

A. Well, a lot would depend on your instructor. He could make it very, very interesting, if the instructor had the ability to do so.

Q. We raise a lot of suppositions.

A. You have to adjust your teaching to the size of the [fol. 519] class. You don't teach a 15 or 20 man class the same way you would teach a 100 or 150, and in some cases, I believe I have had over 200.

Q. To teach a one-man class in a one-man law school would be a lot of adjusting from that, wouldn't it?

A. Yes, it would be a rather marked adjustment.

Redirect examination.

Questions by Mr. Greenhill:

Q. Judge Walker, would you please state whether or not in your opinion the preparation in a small class for class room recitations would be as great or smaller than in a large class?

A. The preparation—are you talking about the students' preparation?

Q. On the part of the student, yes.

A. You mean on the average?

Q. On the average, yes.

A. Yes, I think it would be, because the chances of being called upon are just that much greater.

Q. In other words, they would be greater?

A. There would be more pressure on the student to keep his daily work up.

Q. And if the student realized he was to be called on that day, he would probably bone a little harder, would he not?

A. That would be the natural tendency.

[fol. 520] Q. Judge Walker, in the case book system, are all of the questions asked by the students?

A. Oh, no, the instructor asks many.

Q. Why does the professor ask questions?

A. For many reasons. One, frequently, just to provoke discussion. Sometimes to feel out the class to see whether or not they understand the case. In other words, the instructor has had a report only from one student. He has 99 other students. He doesn't know just how much they know about that case, and frequently he will sample the class by questioning to bring out additional points, perhaps, and also to find out how well the class as a whole has understood the discussion.

Q. Did I understand you to say that you had used the case book system in small classes?

A. Yes.

Q. Has that been used satisfactorily?

A. Satisfactorily from my standpoint. As a matter of fact, I would much prefer to teach a small class than a large class.

Q. And would you use the case book system?

A. Yes.

Q. Professor Walker, would you please state whether or

not first year law students at the University of Texas are eligible to write for the law review?

A. No.

Q. Do you know any reason why a Negro law school could [fol. 521] not establish a law review?

A. No.

Q. Judge Walker, I will ask you whether or not you think it would be reasonable to assume that had the relator or some other student who was only one of 12 to 14 inquiries, had enrolled, that there would have been other students in this law class?

Mr. Durham: We object to his reasoning and assumption, as not being binding, or as not being based upon any hypothesis.

Mr. Greenhill: I want to further qualify that question by saying if there had not been some outside influence to keep students from coming in.

The Court: I think there is no evidence of that, and I think it would be speculative on the part of the witness. He can state the effect of this man enrolling.

By Mr. Greenhill:

Q. Have you noticed enrollments generally in the law schools?

A. Over the United States?

Q. In Texas?

A. Yes, generally.

Q. Do you have any idea of the number of actual applicants, or the relation that bears to the number of inquiries you have, that is, if you have, say, 14 inquiries, how many of those students would probably attend?

[fol. 522] Mr. Durham: We object to that. We don't mind the witness testifying. We certainly don't want the Assistant Attorney General testifying. We object to it as being leading and suggestive.

The Court: Let's let him answer.

A. I don't know that I could answer that accurately. Normally a student doesn't inquire unless he is interested in enrolling. That is our experience in our Law School.

By Mr. Greenhill:

Q. You would assume if 14 people made inquiry at the law school at least four or five of them would enroll?

Mr. Durham: Your Honor, that is the assumption again.

The Court: I think that is an assumption again.

Mr. Greenhill: That is all.

Recross-examination.

Questions by Mr. Nabrit:

Q. Professor Walker, are you aware of the fact that under the present crowded conditions of law schools and educational institutions that former G. I.'s, that have the benefits under that act, write to a large number of schools asking about the courses offered? Are you aware of that?

A. I have personal knowledge of only one or two instances.

Q. Do you handle enrollment at the University of Texas Law School?

A. No.

[fol. 523] Q. So that you are not in a position to state what the statistical experience is as to the number of inquiries and the number——

A. I am not.

Q. Do you know of a law school in the United States with one student?

A. No; I don't know of any law school like that.

Q. Do you know of a law school in the United States with 10 students?

A. Not at the present time. During the war there were.

Q. During the war was abnormal, too, was it not?

A. That is right.

Q. Now, so far as a student is concerned, Professor Walker, is it not true that if he is to do the assignment of the instructor, he prepares as hard, under the case system, for his particular work as if he were in a class with 600? That is, that is true as far as each student is concerned; is that not true? That is, all he can prepare is what the assignment was, and excess work which he wishes to do, is that not true?

A. That is true as far as preparation of the case is concerned, but——

Q. That is what I mean, just preparation of the cases.

A. In other words, there is a certain amount of work in preparing a case, if that is——

Q. An "A" student does that, if he does the professor's [fol. 524] assignment?

A. Assuming he does.

Q. All right. If he doesn't have the incentive to do it, and the instructor doesn't give him the incentive to do it, then he doesn't do it; is that not the fact?

A. Well, assuming all of your points, yes. There are other factors.

Q. I am going to get to the other factors. You are postulating the proposition that the pressure of facing the professor every day with nobody to look around at to take that burden off of him will make him do more work. I am giving you a hypothesis that the discussion of his class mates will provoke viewpoints that he himself did not have the experience and capacity to bring forth. Do you agree that both of those are present in considering the case system of study?

A. I agree to the raising of questions by the students and the discussion. I don't agree that you have to have a large class.

Q. I didn't get to that yet. I am coming to that. Now, let's go to that. What would you suggest from your experience as the ideal size class in law under the case book system or method?

A. That would be a difficult question to answer. It would be less than 25. I think after—my experience has been after you get above 25 your class is getting a little bit unweildy [fol. 525] Q. Unweildy. Do you mean that the ability to properly instruct them is declining in inverse proportion as the numbers accelerate or increase?

A. The amount of attention that you can give to the student, and the kind of work he is doing, and you get to the feeling you don't know what the individual students are doing when the class gets large.

Q. Are you saying as the classes at the University of Texas increase, the amount of training they get diminishes in quality?

A. I think that is true of a considerable number of students.

Q. Of the 886 out there, what percentage of those?

A. The top ranking students would get a good legal education under almost any circumstances.

Q. So you are talking about the bottom ranking students?

A. Not necessarily the bottom, but those below the top, at least.

Q. So that the best——

A. There is a grade in between there.

Q. The best students at the University of Texas Law School are going to get a good legal education, no matter how poor you teach them, or how large the classes get?

A. I am inclined to think that is virtually true.

Q. You can have him.

[fol. 526] Redirect examination.

Questions by Mr. Greenhill:

Q. Judge Walker, these thought provoking questions that counsel is asking you about; I will ask you whether or not it is not often that the professor himself asks those questions?

A. Oh, yes.

Q. That is all.

(Witness excused.)

Dr. Benjamin Floyd Pittenger, a witness produced by the Respondents, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Greenhill:

Q. Will you please state your name?

A. Benjamin Floyd Pittenger.

Q. What is your profession?

A. I am Professor of Educational Administration at the University of Texas.

Q. What is your educational background, Dean Pittenger?

A. Well, I was educated in the public schools in Michigan, took my Bachelor's Degree, Bachelor of Arts Degree, from the Michigan State Normal College at Ypsilanti, in 1908. A Master of Arts Degree from the University of

Texas in 1912, and my Ph. D. from the University of Chicago in 1916.

[fol. 527] Q. Dean Pittenger, in your class room experience at Ypsilanti and the University of Chicago, would you state whether or not those classes were exclusively white, or exclusively colored, or mixed.

A. I recall one Negro in the class which I attended at Ypsilanti and I recall two or three classes in which there were several colored persons at the University of Chicago.

Q. How long have you been in the teaching profession, Dean Pittenger?

A. Well, with the exception of the years spent in college, and two years in the Army, since 1904—since 1902.

Q. Where have you taught?

A. In the public schools in Michigan, in the University of Illinois, in the University of Minnesota, at the University of Michigan, at the University of Colorado, and, of course, the University of Texas, Teachers College in Colorado. That is all that I recall for the moment.

Q. What positions have you held at the University of Texas?

A. I came as what was then known as adjunct professor in the School of Administration and Education, and after two or three years in that service, after I came back from the Army, I became an associate professor of Education and Administration, and I was then advanced in a year or two to a professorship. In 1926 I became Dean of the School of Education, and I served in that capacity until [fol. 528] February first of this year. I also continued my professorship when I was Dean, and on February first I retired to my professorship.

Q. When did you come to Texas?

A. In 1911, for the first time.

Q. That was after you had received your Bachelor's Degree, is that right?

A. That is right.

Q. So that when you came to Texas from Michigan, would you state whether or not you had an open attitude as to the Negro question at that time, as far as education is concerned?

A. Well, I think that I could say that I reflected pretty much the attitude that had developed in Michigan in that community, and later in Kansas where I taught for three

years at Fairmont College. I forgot to mention that a while ago, preceding my coming to Texas.

Q. Did you teach any colored students in your classes, Dean Pittenger, at any of the places you taught?

A. The only place I recall is the University of Colorado.

Q. Are you a member of any professional societies in education?

A. Yes, sir; I am a member of the American Association of Administrators, which is a branch of the National Educational Association, and a member of the Texas Teachers Association, and a life member of the Texas Association of School Administrators, and during the time I was Dean I was ex-officio member of the Association of Colleges and [fol. 529] Departments of Education.

Q. Is that a national association?

A. Yes.

Q. Did you hold any office in that organization?

A. I was President of that for three years.

Q. Have you ever held any office in the Texas State Teachers Association?

A. I was Chairman of the Committee on Finance for that organization for the period of probably 12 years, ending about 1936, and I was President of the Association in 1941 and 1942.

Q. Have you had any dealings or association with higher education for Negroes in Texas?

A. Yes, I have had.

Q. What experience have you had?

A. I think my first experience was as a member of the Board of Trustees, a local Board of Trustees of Tillotson College. Right after the war I participated in several school surveys. I do not recall that there were higher institutions involved, however, in the public schools, which would bring me in contact with Negro education. I visited one or two of the Negro colleges in Texas. I recall Bishop College at Marshall, at the instance of the American Medical Association. That was probably 20 years ago. I consulted with the group at Prairie View during the development of [fol. 530] the graduate program of that institution. During the past summer, I was a member of a committee appointed by the Southern Association of Schools and Colleges to visit five, I believe it was, of the Negro colleges in Texas, to consider the continuation or the raising of the

accreditment level which those colleges had with the Association.

Q. Is Tillotson College a colored institution?

A. Yes.

Q. What Negro institutions did you visit in your tour for the Southern Association?

A. Tillotson College, Wiley College, at Marshall, Jarvis College, which is in a rural community north of Tyler, Texas College, I believe it is caused, at Tyler, and Prairie View.

Q. Now, are you acquainted with any of the leaders of Negro education in Texas?

A. Yes.

Q. Would you name some of those with whom you are familiar?

A. Well, I think my acquaintance probably is—that I know best of all former Principal Banks of Prairie View. I also have known President Rhodes for a number of years. My recollection for names, unfortunately, is not very good.

Q. Have you participated in discussions with those men on the subject of education for Negroes in Texas?

A. Yes, I have. I don't recall that I participated in conversations with them as individuals to any great extent, [fol. 531] but in conferences at which they were present, and in which a number of other Negroes were also present.

Q. I will hand you a pamphlet entitled "The Senior Colleges for Negroes in Texas," and ask you to examine it. Did you participate in the preparation of that booklet in any manner? That is, did you have anything to do with the existence of the book, in the first place?

A. Yes.

Q. What connection did you have with it?

A. I was Chairman of a committee that was called a Steering Committee of the Biracial Conference on Negro Education, and this committee set up a survey, of which this is the report, and chose the persons who participated in the survey and in making the report.

Q. Who called, or who assembled that group which you have mentioned there?

A. Governor Stevenson. You mean the conference?

Q. Yes, sir. Now, were the members of the conference there of mixed races?

A. Yes, sir.

Q. Would you name some of the people on that committee there?

A. Well——

Q. And identify them as to white or colored, white or Negro?

A. Dr. T. D. Brooks, Dean of the Graduate School of Texas A. & M. College, white; Principal W. R. Banks, of [fol. 532] Prairie View, colored; President J. J. Rhoades, of Bishop College at Marshall, colored; Mrs. Joe E. Wessendorf, past President of the Parents-Teachers Association, white; Dr. Thomas W. Currie, of the Austin Theological Seminary, white;—Dr. Currie died shortly after the committee was set up, and became active, and Dr. T. S. Montgomery, head of the Department of Education of Sam Houston took his place, white. Dr. R. P. Hamilton, physician and surgeon in Dallas, was originally appointed. Dr. Hamilton was colored. He requested to be relieved because of his health, and Dr. H. E. Lee, of Houston, took his place, and Mr. Gordon Worley was Secretary of this Committee and was Director of Special Problems for Negro Education at that time.

Q. Did you write the foreword to this booklet?

A. Yes.

Q. I will ask you to state whether or not you have been interested in the development and improvement of Negro education in Texas?

A. Very much.

Q. In your experiences in visiting the Negro colleges, and those colleges at which Negroes and whites attend, have you had the opportunity to observe the educational opportunities and advantages offered by these institutions?

A. I have.

Q. In your experience as an expert in the field of educa- [fol. 533] tional administration, assuming the facilities of both colleges are equal, is it possible for a Negro to receive an equal education in a separate college?

Mr. Durham: We object to the part of the question "is it possible." We have no objection to him expressing his opinion.

The Court: Yes.

By Mr. Greenhill:

Q. In your opinion, Dean Pittenger?

A. If by equal you do not mean exact duplicate, yes.

Q. It would be substantially equal?

A. That is right.

Q. Assuming otherwise equal facilities or substantially equal facilities, would the mere fact that the college is composed exclusively of colored students, of itself, mean an inequality?

A. With the same interpretation of inequality, it would not, in my judgment.

Q. Now, in your judgment, are there advantages to the Negro in being taught in a separate institution?

A. Yes.

Q. What are they?

A. Well, the reason that I made the statement that I did with respect to equality appears at this point. I think that the educational value of—that the value of an education to a student at any level is determined by the total college situa- [fol. 534] tion in which he carries on his college work. It isn't merely a question of class room teaching and study, or of laboratory activities or of library activities, but I think that a very large part, and an increasing part of the value of eduction at any level is in the total influence, the influence of the total contact of the student with the institution.

Q. I will ask you whether or not you think the Negro student would have the same opportunity to develop leadership in a mixed institution, or at a separate institution?

A. I think that normally, ordinarily, he would have a better opportunity to develop leadership in a separated institution than in a mixed institution, and I make that statement because the whole life of the institution would then be open to the Negro's participation. My judgment is that particularly in the south, that the Negroes' opportunities in institutions patronized in the great majority by whites would be limited to the class room facilities, and the regular educational activities almost wholly.

Q. Now, Your Honor, I want to ask him the next question simply in rebuttal to testimony developed by the relator. It is our understanding that we did object to this line of testimony, but since it has been put in, we want to ask this question in reply to those statements of relator's witnesses. I will ask you, Dean Pittenger, in your opinion as an expert [fol. 535] in the field of Educational Administration, whether or not you think it would be to the best advantage of the State of Texas and of students to continue the policy of segregation in the schools and colleges of Texas?

Mr. Durham: Just a minute. Now, Your Honor, they have objected to that form of testimony. I don't want to object to it, if I have got a right to reopen my testimony. I won't object, if I have got a right to tender certain testimony that the Court excluded yesterday.

The Court: Of course, if it is the same, if this is admissible in rebuttal, testimony on your side would be admissible.

Mr. Durham: No objection.

Mr. Greenhill: Mr. Reporter, would you read him the question, please?

(The Reporter read to the witness the last question set out above.)

A. All of the consequences considered, I think so.

Q. Would you please state your reasons for that answer?

A. Part of it was included in the statement I made a moment ago that I believe a part of the value, a great part of the value of higher education, especially in the identification and development of leaders, gives more opportunity for participation in all of the activities of college to the extent that those are restricted to that extent, that essential value of higher education is lost, but my fundamental feeling [fol. 536] about the matter rests in what I conceive to be the effect of the elimination of segregation on the higher level upon segregation upon the lower level. Let me say that my experience as professor of school administration, and my training and my teaching have directed my attention more toward the public school level, the elementary and secondary level of teaching, than toward the higher level.

I function in a higher institution of learning, but my principal interest, and my principal work has been to try to advance and improve public education in Texas, especially in the elementary and secondary levels. So, I have been concerned with the school administration that functions at those levels.

I am unable to see how segregation could be constitutionally maintained below the college level and be unconstitutional at the college level, and so my feeling is that the—my principal fear of the breakdown of segregation on the higher level is what I conceive to be the breakdown, the influence upon segregation in the lower level. I believe that the—I believe that the development of the public school system in Texas historically was pretty much—was pretty much

aided by the early appearance of segregation in this state. To put it definitely, I think that the progress of public education in Texas would have been much more retarded than it is if we had not had segregation. I think that the reasons [fol. 537] that justified, as I say, the segregation in those days, still obtain. The public educational system of Texas is a long way from having reached anything like the national standard as a whole, and we are still in the formative period.

My judgment is that is segregation were abandoned in the lower level, that it would become as a bonanza to the private white schools of the State, and that it would mean the migration out of the schools and the turning away from the public schools of the influence and support of a large number of children and of the parents of those children, and that those migrants and their parents are necessary because there would be additional tuition involved coming from a group of citizens who are the largest contributors to the cause of public education, and whose financial and moral support is necessary for the continued progress of public education.

Now, the south has had to fight against the private school tradition since the beginning. Public education started later in the south, in the main, and advanced more slowly in the south, and it is today more backward in its development than elsewhere in the country, and that was due to the plantation system, of course, of economy, and to the English tradition that, with respect to education, the tradition that education was the prerogative of the home and the school. That was held by the influential people of that day. Now, [fol. 538] the fight for public education in this State has been to a very large extent the matter of the converting of people with that background to the support of public schools, and to the patronage of public schools.

The matter counts in another way, I think. There are some nine or ten thousand colored public school teachers in Texas. If segregation were abandoned, I can't help asking myself what would become of that body of Texas teachers, our colored teachers in Texas. If these teachers moved with the pupils into the public schools, it seems to me that that would mean that we would not only have the colored and white together as students, but that we would have rather indiscriminate assignment of teachers to classes, wholly irrespective of the merits of the feeling that exists and operates here as a fact. I believe that that bringing of colored

teachers in the class rooms for white students would accentuate this movement of public schools.

However, that question, I have no means of knowing, but I think it is reasonable to believe that at the present time the attitude of Texas people being what it is to a very considerable degree, that the effect of the abandonment of segregation on the lower level would set back the public school movement in this state, and as one who has devoted his life to an attempt to improve it, I can't regard that with equanimity. If the teachers are not moved with the students, then what becomes of the colored teaching profession in Texas?

[fol. 539] The great majority of the colored teachers are employed in the colored public schools, both in Texas and elsewhere. Teaching is a principal outlet of service for the educated colored man and woman. There are somewhere between seventy-five and a hundred thousand colored teachers, I would estimate, in public schools in the south, and the implications of segregation for that group, in my judgment, are serious. Now, I think that that not only affects the question of segregation on the higher level, in that it would seem to me that the breaking of segregation on the higher level would move in that direction, but I think it also affects the efficiency of the education of the colored and white students in preparation for higher education. So, I think it has a double relation, and in my judgment, it would at least in that way come back and affect higher education adversely in this state.

Those, I think, are my principal reasons for the statement that I made.

Mr. Marshall: May it please the Court, we have waited as we have been doing all along, to see just where the testimony was going. At this time we move to strike everything said about lower schools. The reason I do, sir, is that although Dr. Pittenger is an expert in the field, I think his original statement was assuming that you can't have unconstitutionality at the graduate level without affecting the [fol 540] lower level, and he isn't a legal expert, and he doesn't have a right to draw that conclusion.

The Court: He doesn't have a right to draw a conclusion as to constitutionality.

Mr. Marshall: All of his testimony was based on that, and we move to strike it.

Mr. Greenhill: Their witness yesterday on the stand testified that in his opinion——

The Court: Are you abandoning your theory that it is only higher education and only one man involved in this case?

Mr. Greenhill: Oh, no, sir.

The Court: Then, this would not be admissible.

Mr. Greenhill: Sir?

The Court: This would not be admissible as to the others, would it?

Mr. Greenhill: On the stand yesterday, over our objection, their witness testified that the time was ripe now to just throw off segregation entirely from the graduate school to the kindergarten.

Mr. Marshall: No, he didn't. He said just the opposite, that the time was ripe for the graduate school,

The Court: That is what I understood, was for the graduate school.

Mr. Daniel: Yesterday we objected to all of the testimony [fol. 541] concerning schools in general.

The Court: Yes.

Mr. Daniel: That was overruled, and we preserved a bill. We offer this simply in rebuttal to that, in case the Court allows that yesterday to stand.

The Court: In so far as any evidence has been received here affecting the secondary schools or less than graduate schools, I am not considering it.

Mr. Greenhill: We certainly do not waive our point that the case should be limited to the two schools in question.

Q. Now, Dean Pittenger, I will read you a portion of this pamphlet from which relator's witness testified yesterday, entitled "The Senior Colleges for Negroes in Texas," on page 83, which is in the nature of a summary from all of the statistics drawn in this pamphlet.

Mr. Marshall: We object to any reading of conclusions from that pamphlet. The witness can testify as to his conclusions.

Mr. Greenhill: I am going to ask him if these are his conclusions.

Mr. Marshall: All right.

The Court: All right.

By Mr. Greenhill:

Q. (Reading.)

"Admission of Negroes to existing State Universities [fol. 542] for whites is not acceptable as a solution of the problem of providing opportunity for graduate and professional study for Negroes, on two counts: (1) Public opinion would not permit such institutions to be opened to Negroes at the present time; and (2) even if Negroes were admitted they would not be happy in the conditions in which they would find themselves."

I will ask you to state to the Court whether or not these views are your views?

Mr. Marshall: We object, if Your Honor please, because the testimony offered yesterday in the form of Donald Murray was directed to the point as to whether or not there was validity in the fact that if you attend a school you will be unhappy, and was stricken on the motion of the Attorney General. Either that goes in or nothing.

Mr. Greenhill: We would be very happy for all of the evidence offered throughout this book on all the State institutions and appropriations and their faculty to be stricken.

The Court: We are not concerned with that. The only question here resolves itself into legal administration of schools, and it is difficult for us to determine the condition of one's emotions when he enters any school, so I think we are concerned as to whether or not the first part of that is [fol. 543] his opinion, that it is to the best interest for this, for the abolition of segregation.

Mr. Greenhill: Did you sustain his objection?

The Court: Yes.

Mr. Greenhill: Note our exception.

The Court: Yes, sir.

Q. Relator also brought over this "General Study of Colleges for Negroes," a publication, I believe, prepared by Mr. Caliver, in which it was stated, "negro students in northern universities do not, as a rule, participate fully and freely in the life of the institution." You having been educated in a northern school, and having taught there, do you believe that is a correct statement?

Mr. Marshall: If Your Honor please, that was around 1911, I think it was. I think that is a little far back.

By Mr. Greenhill:

Q. Have you made any study of that in recent years? Have you studied any of the recent scientific reports on this subject?

A. Not to any great extent, no, sir. I would say this——

Mr. Durham: We object to that.

The Court: If he doesn't know that.

A. The date 1911 is incorrect.

Mr. Marshall: I apologize.

By Mr. Greenhill:

Q. Do you know whether or not these are the facts?

[fol. 544] Mr. Durham: We object to that. He says he doesn't know, I believe.

By Mr. Greenhill:

Q. When was your latest study of northern schools, Dean Pittenger?

A. My latest contact was in a summer session at the University of Colorado in the middle thirties, I would say 1935 or 1936.

Q. Well, now, at that time did you notice whether or not this statement that I have read here was the fact?

Mr. Durham: We object to that as being a conclusion and opinion of the witness as to what the mental processes of the students were in that school.

The Court: Yes, you had better ask what he saw.

By Mr. Greenhill:

Q. Did you observe whether or not the students were given a full opportunity to participate?

Mr. Durham: We object to that as an assumption that he did observe.

The Court: Just what he did see.

By Mr. Greenhill:

Q. What did you observe?

A. I can relate one incident that occurred. In my class in school in finance at that institution, I taught a Negro principal from Houston, and since he was from the same part of the country I was, I stopped him after class and talked to him about his experiences in that institution.

Q. Go right ahead, sir.

A. I didn't inquire as to the extent of his participation [fol. 545] in the general college activities. I feel very certain as to the extent of it.

Mr. Durham: We object to his feeling.

The Court: Yes, I think that is right. He would have to recite things he saw and observed.

A. All right. I asked the principal where he was living, and he said that he was living at a small——

Mr. Durham: We object to that as hearsay, anything the principal said.

The Court: Of course, that is true.

By Mr. Greenhill:

Q. That is correct. Would you just recite what you observed in connection with that student?

A. Well, I didn't observe any participation by Negroes outside the class room.

Q. Did you observe any activities on the part of that student outside of the class room which would have tended to develop leadership and other qualities?

Mr. Durham: That is an opinion and conclusion.

The Court: He can testify what he observed.

Mr. Durham: What it tended to do would certainly be a conclusion.

By Mr. Greenhill:

Q. Have your observations of mixed groups at universities in the north, whenever there was revealed any discrimination there that would prevent full participation in the total college activities?

[fol. 546] Mr. Durham: We object to that because it is a wholesale question, at any period or any time, as being indefinite and uncertain.

The Court: He asked if he observed it. I will let him answer it.

A. I didn't observe any participation——

Mr. Durham: We ask——

A. —outside of the class room.

Mr. Durham: —that that be stricken as not responsive.

Mr. Greenhill: Read him the question.

(The Reporter read to the witness the question last set out above.)

A. No.

Mr. Durham: We ask that it be stricken because he didn't ask him if he observed. If the Court please, he asked, "your observations," assuming he had observed.

The Court: I believe I will let it stand.

By Mr. Greenhill:

Q. Dean Pittenger, I will ask you whether or not in your opinion as an expert in the field of Educational Administration, whether or not a Negro student can receive substantially an education, substantially equal, in a colored institution to that which he would receive in a white institution, or mixed, provided the facilities of both schools were substantially equal?

Mr. Durham: We object to the word "can", and sub- [fol. 547] stantially.

The Court: Does he have an opinion, is what we want. You can amend it by saying, does he have an opinion.

Mr. Durham: Further, we think any testimony should be upon his conclusions, and not a conclusion of law that is the issue in this case.

By Mr. Greenhill:

Q. What is your opinion on that point, Dean Pittenger?

A. I confess that am a little confused by the status of the question now. Will you clear me up on that?

Q. I will ask you whether or not, based on your experience as an expert in the field of educational administration, assuming equal facilities in the schools involved, whether or not a Negro student can and will or could receive, I will say, could receive——

The Court: Has the opportunity to receive.

By Mr. Greenhill:

Q. Does he have the opportunity to receive an equal education in a school exclusively colored, as compared with that of mixed colored and white?

A. That is one I am puzzled about. May I ask about that?

The Court: Yes.

A. I am unable to think for the moment of colored institutions and white institutions which do have equal facilities with which I have been associated.

By Mr. Greenhill:

Q. I understand that, Dean Pittenger. I am asking [fol. 548] you to assume equal facilities.

A. And then you ask me does he——

Q. Did he have the same or equal opportunity?

A. In my judgment, yes. He would have equal opportunity, as I defined equal opportunity a while ago, a total opportunity, but not the same.

Q. That is all.

Cross-examination.

Questions by Mr. Marshall:

Q. Dean Pittenger, this Negro principal from Houston who was in Colorado when you were teaching; you testified that he didn't participate in any of the outside activities. I want to ask you a question as to how wide was your knowledge of what he did when he wasn't in class?

A. Only what I got through conversations with him.

Q. Only through conversation?

A. That is right.

Mr. Marshall: If Your Honor please, may we have that answer stricken?

The Court: He didn't answer anything.

Mr. Marshall: I mean his original answer, not that answer.

The Court: It was based on his observations, and rather goes to the weight than to the admissibility.

[fol. 549] Mr. Marshall: All right, sir.

Q. Do you know of any institution for college training—I am speaking of college trainitg, public or private, in the

State of Texas, to which Negroes are admitted which is equal to any of the State supported schools operated exclusively for white students?

A. There is only a range of merit in both. I believe that in total Wiley College is comparable with some of the smaller colleges for whites in Texas.

Q. First of all, I will ask you, Wiley is a private institution, is it not?

A. I beg your pardon?

Q. I wanted to get that clear.

A. It is. That is right.

Q. Wiley College, in the first place, isn't a university, is it?

A. No.

Q. It is a mere four year college. Now, does, in your estimation, does Prairie View—first of all, let me ask you this. Is Prairie View, to your mind, a university?

A. No.

Q. What is the highest classification you could give it, as an expert, as of today?

A. Well, I think it is more than a college, and there is no intermediate term, so far as I know. I think I interpreted [fol. 550] your question. I don't regard Prairie View as a university in the sense that I would conceive of an efficient university. It is more than a college.

Q. What makes it more than a college?

A. The fact that it has graduate work. It offers graduate work.

Q. But it has no professional schools?

A. No.

Q. Is not usually the term "university" applied to schools —professional schools?

A. Graduate work is generally regarded as professional.

Q. Are there any other universities in the country that have only graduate work, and no professional work? By professional work, I mean law, engineering, dentistry, et cetera?

A. I don't know of any. I could not answer that.

Q. Can you name two State supported schools of higher learning, from college level up, that you compare Prairie View favorably with, in Texas?

A. I think so.

Q. Which ones?

A. I believe that, in total, it would compare with one or two of the teachers colleges in Texas.

Q. Could you give us any one of them?

A. Well, a statement of this sort sounds derogatory, but I think that in total it is comparable for the purpose which it serves with perhaps the Teachers College at Alpine.

[fol. 551] Q. Are you familiar with the fact that the physical plant at Prairie View is less in value than any of the teachers colleges?

Mr. Daniel: Your Honor, we want, just for the purpose of the record, to renew our objection to all of this line of testimony as to other schools.

Mr. Marshall: Your Honor, he said it was equal to—

Mr. Daniel: I want the record to show the point.

The Court: All right, you can save your point.

A. No, sir; I have not compared the values of the plants of two institutions, but I have thought that that was probably the case.

Q. When you say "equal," what do you mean by "equal"?

A. Well, I mean in the total educational value of the services of the institution. Now, the institution at Prairie View is much more many-sided than the institution in Alpine, or almost any other of the Texas Teachers Colleges. It offers a much more varied program and much more varied opportunity to the Negroes of the State than does—than do several of the teachers colleges, perhaps all of them, to the whites of that area. It is not—so far as the equipment that it has, piece by piece, building by building, it is not the equal. There is more of it, and it serves a greater variety of purposes.

Q. In your teaching of education and school adminis-

[fol. 552] tration, and your general knowledge in the field, is it correct in educational, rather, in approved colleges you give credit for A. B. Degrees for mattress making in a college?

A. No, I don't think it is.

Q. Or for broom making? Do you know of any institution other than Prairie View where that is done? As a matter of fact, in your teaching, do you not teach, and in your administration, do you not recognize the fact that that is not a proper subject for credits in a college?

A. I think that that might be a proper subject of instruction in a college which serves the functions of Prairie View.

We have a great deal of vocational work offered in our white colleges for the services of people with different vocational objectives, and I would want to know more than I know about the quality of the work done, and the length of the course, and the things involved in a course of instruction of that sort.

Q. Isn't it just general that such vocational subjects are usually taught in vocational high schools and regular high schools?

A. No, they are becoming increasingly,—it depends on the level of the work, and the quality of the work. That is the reason I say I would like to know more about the course, because I don't know.

Q. I see. In going back to our comparing the quality of [fol. 553] the type of education offered at Prairie View, isn't the amount of moffey available to the school a value in arriving at the equality of the facilities offered?

A. That is one measure, yes.

Q. Isn't it true that Prairie View gets less operating funds than any of the other operating schools in the State?

A. It did at the time this survey was made. I can't answer that question as of today.

Q. Didn't your survey also point out the fact that because of its lack of money, Prairie View lost many of its good teachers?

A. Yes.

Q. Many with Ph. D.'s?

A. Yes, sir.

Q. So that we then get to the faculty of the school. Isn't that a basis for comparison?

A. That is right.

Q. As of the time your survey was made, did you find that the level of the faculty at Prairie View would compare with the other schools?

A. Not on the average, no.

Q. Now, isn't library facilities and library books, number and quality, a valid basis of comparison?

A. Yes, that is right, and it would not compare.

Q. It would not compare with any of the schools, would it? [fol. 554] A. That is right.

Q. If you compare it item by item, isn't it true that Prairie View is below any of the other schools; isn't that true?

A. If you leave out the scope of its work, the scope of the institution, and take it up piece by piece and compare with

other institutions, I think that is true. I think that it was true at that time.

Q. Dr. Pittenger, you testified as to the college and graduate level to the effect that if Negroes were admitted to the University of Texas, or one of the other State supported schools, to sum it up, it wouldn't work; isn't that correct?

A. I think that I testified that I didn't believe that the Negro would have the opportunity to participate in the activities of the school to the extent that he would have in a segregated school.

Q. Is that based on your opinion as to what the students, the attitude the other students would take?

A. Yes, in part.

Q. Has anybody polled the students of the University of Texas to find out how they feel?

A. Not to my knowledge.

Q. Your opinion is just based on your own personal knowledge?

A. Personal knowledge, yes; based on thirty years of contact.

Q. Thirty years of contact. Do you know anything about the student body of the Law School?

[fol. 555] A. Very little.

Q. Is there any factual basis you have for your opinion as to what would happen if a Negro was admitted to the Law School of the University of Texas?

A. The only factual basis I have is what we—would be the knowledge and understanding that I have of the attitude of the people in this section of the world.

Q. You are aware, are you not, of the fact that members of the Bar of the State of Texas do not suffer from any segregation after they once pass the bar; are you aware of that?

A. Yes.

Q. What reason do you have that would make it so contrary to that principle to have the students to go to school together a week before they pass the Bar Examination?

A. I don't think I understand that question.

Q. Well, I started with the question that when they passed the Bar, the white and Negro lawyers practiced together. There is no friction at all among them. They take the Bar Examination together. What I am asking you is that why is it that if they can take the Bar Examination together and

try cases together, that you make the assumption that they can't sit down in a class room one week before that, before they take the Bar Examination together?

A. I think there is a difference between an experience of that sort and a three or four year association.

[fol. 556] Q. I would be very interested in the difference, sir.

A. Well, in the first place, you have, by the time you get to the Bar Examination, you have your more serious students selected. In the second place, there is the interest of the group at that time, all very definitely centered on a final project, that of taking the Bar Examination. Over a three year college course you don't have the same selection of students. You have the activity going on on a general campus where there are not only law students, but thousands of others, and you have the opportunity for the cumulative feature.

Q. What I am trying to get at is that the Law School is in a separate building from the rest of the campus?

A. Yes, it is.

Q. It has its own library there, is that correct?

A. Yes.

Q. And is it not true that by the time you reach the stage of going to the Law School, you have a pretty staid objective then, don't you?

A. I think so, more so than the usual college freshman.

Q. Isn't it also true that there is, as I understand your testimony, there is just three years' difference in this matter. For example, do you think anything would happen, or any of the results you have testified would occur if a Negro transferred and entered for the first time the third year of Law School of the University of Texas, which is [fol. 557] less than a year before the time we were talking about?

A. May I,—I think that you have a wrong impression of my testimony, if I understand your question. I have not been intending to intimate that I thought something would happen.

Q. I didn't mean that. I meant exactly what you testified to, to the effects of it on the students.

A. My statement was, if I recall, that I thought that the opportunity of the colored student to participate in the activities, the total life of the mixed institution would be

limited as compared with the opportunities on a segregated campus.

Q. Get back to our question, then; since I understand you.

A. Yes.

Q. If the Negro was admitted to the third year law class, having gone to school in some other approved school for the other two years, would there be any effect on the student as to campus activities or anything else?

A. I would think he would have less opportunity then than if he had gone in and spent three years.

Q. Is there anything that you can name that would stand in the way of a Negro entering the Law School in the third year that would affect that student's legal education?

A. I am not a professor of law.

Q. I am just judging on your other assumptions, as to what they wouldn't get in outside community life, as to [fol. 558] that part of it.

A. But, if I understand you, you have restricted your question to legal education?

Q. Yes, sir; that is what I was trying to do.

A. And I started out with the assumption of education on every level, on the subject matter of education. It is the opportunity that the student has to mix and to develop in the whole college situation that must be considered, and it was from that point that I was talking. I can't answer a question with respect to legal education.

(Court was recessed at 10:45 a. m., until 10:55 a. m., May 16, 1947, at which time proceedings were resumed as follows:)

Mr. Marshall: Your witness.

Mr. Greenhill: We have no further questions.

(Witness excused.)

Mr. Daniel: Before the State rests, we would like to be just understood, or have the right to at some time this afternoon before the case closes completely, to again present to the Court the testimony of Henry Doyle, and present to the Court certain authorities under which we believe that part of his testimony is admissible as circumstantial evidence as to the participation of the N. A. A. C. P.

[fol. 559] The Court: I would be glad to hear any proposition you have to make.

Mr. Daniel: We rest, with the understanding we may present that a little later on.

Mr. Durham: As I understand, the only matter the Attorney General will be permitted to present or bring up is the Doyle testimony?

Mr. Daniel: And any rebuttal testimony that we might have to your rebuttal testimony.

Mr. Durham: I think we have a right to close this case.

The Court: You close, ordinarily.

Mr. Marshall: At this time, for the purpose of the record, I want to first make a statement that as to the testimony of Donald Murray yesterday, and prior to that time, and the witness today, have both quoted from a statement, and his testimony is all to the effect that if a Negro is admitted to a Law School or to a University in the south that the student body will withdraw and go to private schools, and that is exactly the type of testimony that was given by Mr. Murray yesterday; that in an exactly similar situation, the exact statement made, that that didn't happen, and the students didn't withdraw and go to private schools, and we would like to re-tender that evidence which we put on in a bill of exception.

[fol. 560] The Court: I am not going to consider either of those bits of testimony myself.

Malcolm P. Sharp, a witness produced by the relator, having been by the Court first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Marshall:

Q. Will you give your full name, please?

A. Malcolm Pittman Sharp.

Q. Your address?

A. 5329 Greenwood Avenue, Chicago.

Q. What is your present occupation?

A. Professor of Law, University of Chicago.

Q. Will you state briefly your legal education and your qualifications in general, in the field of law?

A. I received my A.B. at Amherst in 1918, A. B. in Economics at the University of Wisconsin in 1920, L.L.B. at Harvard Law School in 1923, Doctor's Degree, Harvard Law School, in 1927. I did some teaching while I was still in college. Then I have been teaching law since 1925, at Iowa, Wisconsin, and the University of Chicago; a member of the New York Bar,—counting a period for establishing residence, I practiced in New York City for about two [fol. 561] years, served in various advisory capacities in Wisconsin and Washington during the past years.

Q. And are you a member of the Association of American Law Schools?

A. I am.

Q. And have you recently held any position on any committees of that association?

A. I was Chairman of the Curriculum Committee that reported in 1942. Our work was somewhat disorganized by the war.

Q. What was the purpose of that committee?

A. The committee is appointed annually to consider the curriculum of member schools, recommend changes, improvements, make suggestions to member schools.

Q. Now, as a result of your studies and your teaching experience, along with your experience in the Association of American Law Schools, would you state briefly the recognized purposes of a law school as of today?

A. The purpose of a law school is, of course, first; to train for practice of the profession in the familiar way. The second purpose has been becoming more and more important, as all of the leading schools have recognized, training for positions of public service, as lawyers are called on to fill, to a marked extent, administrative agencies, the bench, legislative positions. The schools are paying more and more attention to training for that purpose. Of course, [fol. 562] the training of teachers and scholars in the field.

Q. In the several items you have mentioned, what type of student body do you need in order to best accomplish that purpose?

A. You need more than anything else, what I should call, a stimulating student body.

Q. What is that?

A. Where competition is great, lively; people from all walks of life. It is more important than your faculty.

The most important thing a faculty does, perhaps, is to attract a stimulating, large student body.

Q. Speaking of the student body, your testimony is that you need all walks of life. Are there any other factors you need as to individual students?

A. You need to be well prepared, I should say, in so far as the group of students came from educational institutions whose standards were not up to the best that the others have. They would be a less stimulating group, to that extent. Their native capacity, and their training would not have been up to that of the other students.

Q. What method do you use in teaching in the University of Chicago?

A. We use the case method.

Q. Will you explain that briefly?

A. I agree with much of what Professor Walker and Dean Harrison have said. We have our individual differ- [fol. 563] ences. The case system is designed to, in the first place, to bring out clearly the rules of law, partly by making discussions clear, working over discussions in class room; partly by practicing the application of the principles applied to cases.

I should say those particular advantages in a controlled situation starts the students off to what they are to do all through their careers at the bar. Of course, with practical problems, they have, perhaps they have heard of them in law school, and developed capacity for judgment, which is the mark of a good lawyer. I think in these days a very important addition to the case system is the seminar system which has been considered, and again, we give the students a chance to develop, present their own individual work, differ perhaps, and present it to the class mates for criticism, and hashing over in small groups.

Q. Do you believe the seminar method can be used in a first year law class?

A. I think it can be.

Q. Under what conditions?

A. This is a rather odd notion of my own. As a matter of fact, I think not many law teachers would agree with me, but we have had some success in our tutorial work in our first year students, not for the first year students to work right away at problems, if you are talking about the familiar [fol. 564] first year class. The use of the case system would be better than the most likely alternative, lecture. Seminar

is theoretically possible for first year students, but as far as I know, it isn't used anywhere, and I haven't heard that that was suggested here in connection with the proposed new school.

Q. Dr. Sharp, the other question I wanted to ask was—first, I will ask you, is it possible to use the case system in a one-man class, with one man and a professor?

A. Well, as a matter of words, but it wouldn't be what I call the case system.

Q. And is it—which system is the recognized system for teaching a law school today?

A. The case system.

Q. And as used in the progressive law schools of the country today, is it possible to use that same system with a one-man class?

A. Not really, no, I think not.

Q. Doctor, as a matter of fact, wouldn't it come mighty close to the lecture method?

A. I think there would be a great danger that it would.

Q. Do you believe that—well, in your experience—let me ask you this question. Assuming that the proposed Negro Law School is equal in all other respects to the Law School of the University of Texas, except in respect to the size of the [fol. 565] student body, and further assuming that the proposed Negro Law School has a student body which consists of one student; in your opinion, would the Negro Law School offer to that Negro student a legal education equal to that offered to any student at the University of Texas which has a student body of more than 800 students?

A. Certainly not.

Q. With the same hypothetical question put as to the Negro Law School, inserting the word "ten" for the word "one" student, would that change your answer at all?

A. It seems to me still very clearly that the education there wouldn't be in any sense equal.

Q. In your opinion, would it offer to that Negro student a legal education substantially equivalent to that offered to the students at the University of Texas?

A. As far as I can visualize the situation, it would not.

Q. Assuming that the Negro Law School is equal in all respects to that of the University of Texas, and had a sizable number of students, but all restricted to the Negro race, would that school give an education equal to that at the

University of Texas, which accepts all students of all groups and all nationalities, other than Negroes?

A. I do not see how it could, for many years, at least.

Q. Will you give your reason for that?

A. You are back to that point about competition. Not [fol. 566] only does it give you argument and give you the examination of the issues that you get in the class room, and having a pretty good class, some size, some opportunity for competition, but a great deal of the student's education occurs outside the class room, as we all know. There has been a saying in the teaching profession for some time that students at Harvard Law School got a good deal of their education by arguing on street corners and in restaurants, and bickering back and forth among themselves. The best thing a teacher can do is start that sort of arguing going, and let it go on all day, with intervals out for briefing cases; a good deal of discussion back and forth.

In view of the testimony that has been given about the character of Negro education at the lower levels——

Mr. Daniel: We object to that. That isn't responsive.

The Court: I think not.

Mr. Marshall: Very well. Go right ahead.

A. Unless the education of the Negro group at all lower levels is equal to that of the white group, we can't expect the competition of the Negro Law School to be as stimulating as the competition in the white law school, which we have assumed to be equivalent in other respects. I should think that one very important function of legal training would be neglected in the Negro school. That is the function [fol. 567] of preparing law students for positions of responsibility as lawyers in Government. The experience of three colored lawyers whom I know particularly well——

Mr. Daniel: We object to that.

Mr. Marshall: I was going to ask him that anyhow.

Q. Doctor Sharp, the University of Chicago, as to race, is the faculty of its law school mixed, or is it separate?

A. It is mixed. We have just called back one of our colored graduates to take a position on our staff as Associate Professor, and Research Professor.

Q. What about the student body?

A. It is mixed. The first time I had had occasion to count the Negroes, I found we had 13 in a student body of about 300.

Q. You mentioned the fact of the purpose of the law school to develop men and women for public service to the country. Well, in your experience at the University of Chicago, can you name any students who happen to be Negroes who have graduated from the Law School, and of your own personal knowledge, gave themselves to public service to the country?

Mr. Daniel: We believe that specific instances are irrelevant and immaterial. He has drawn his conclusions from it.

The Court: Yes. I think the conclusions are well taken, but I doubt if the special instances would assist us any.

[fol. 568] Mr. Marshall: May we have an exception?

The Court: Yes.

Mr. Durham: You will have to let him answer the question.

The Court: To make the bill, he can answer the question.

By Mr. Marshall:

Q. Answer for the bill of exception.

A. There are a number of such cases. Three or four come to mind, particularly. Mr. Ming, who has just come back on our staff, has had a career of public service. Mr. Truman Gibson has had a distinguished public service career.

Q. Would you mind giving that?

A. I am coming back. I was just selecting. Judge Hastie is not one of our graduates, is one of the best I know.

Q. Do you know which school he is from, law school?

A. He is from Harvard; a different generation from mine, but I know of his career. Earl Dickerson, one of our graduates, served on the Council in Chicago. Mr. Charles Houston, a year ahead of me at the Harvard Law School, and on the Harvard Law Review with me, is a bills and notes expert. I can say a word about the career of two or three of these men particularly that seem to illustrate the importance of the point. We naturally think teaching is important. I see no reason for losing talent to the teaching profession on account of color. We are glad to have Mr. [fol. 569] Ming back with us, and it is an advantage to us

and to the school that he was not trained in a separate school. He is an American, working on the problems of the State, public utility problems, in which he has had special experience, on cases of problems relating to the regulation of business by Government, which is an increasingly important problem for lawyers, and it is important, it seems to me, that he should be trained to think as a member of the total community. Particularly, he should be trained to think professionally as a member of the total community.

Mr. Gibson is a striking example. He was Special Assistant to the Secretary of War during the war, and was given a medal for his services, and is a member of the President's distinguished committee on public military training. He is a member of the National community, and it is of utmost importance that he was not trained at a segregated school.

Mr. Houston, another schoolmate at Harvard, is working in the field of labor. Government regulation and industrial regulation, working on problems of seniority in the law. He is sometimes able to point out the effects and the abuses of the labor organization practice.

Judge Hastie had a very distinguished career in the field of law——

Mr. Daniel: We will agree in their bill of exception they [fol. 570] can write all of that out in there. We can agree they can write up everything he would have testified to about it.

Mr. Marshall: We have just a few more.

The Court: Maybe you can conclude it here now.

By Mr. Marshall:

Q. Will you give Judge Hastie's present position?

A. Governor of the Virgin Islands.

Q. In your experience with these and other students, do you believe that those students, excluding Hastie, whom you do not know personally, from personal contact with him, could any of those men you have named obtained their information that they have used for public service, in a segregated law school?

A. That question of "could" again troubles me. There are distinguished graduates of Howard, which is not strictly a colored law school, but it is largely colored. I wouldn't want to be that sweeping in my statement.

Q. Do you believe you can get equal value with training of other students, in a segregated law school?

A. Other things being equal, I most emphatically do not.

Q. You testified a while ago about the more competition——

Mr. Durham: We tender this as testimony outside of the bill of exception.

The Court: All right. I will give you your bill.

Mr. Daniel: That is the end of the bill?

[fol. 571] Mr. Durham: Yes.

By Mr. Marshall:

Q. In your opinion, is it possible for one student or ten students entering the first year law class in the proposed Negro Law School that you have heard testified about here where there are no upper classmen, second and third year students, to secure equal or substantially equivalent of legal training to that received by first year law students at the University of Texas where there are hundreds of upper classmen?

A. I think it is not possible for them to receive equal training.

Q. Will you give your reason?

A. What has been said about the competition among classmates, the emphasis has been on the competition of classmates so far. What has been said about that applies to the stimulation a man gets from the upper classmen, and the guidance. Sometimes loose guidance is very healthy, worried about one thing and encouraged about another, and the stimulus which comes from having a full complement of classes and full complement of upper classmen is a matter of first rating in any school. It is essential to the existence of what I should call an operating school.

Q. Do you consider a law review as extraneous to a legal education?

A. Certainly not. One of the most important devices, [fol. 572] most important instruments of legal education in a modern law school is the law review.

Q. Is it of any value to a first year student?

A. It is, in so far as the competition for that outstanding honor, as it is in most schools, makes itself felt all the way down the years. It sets the tone. The law review men are the people that set the tones.

Q. Do you believe the Order of the Coif and other honors are extraneous to a legal education?

A. No, I do not.

Q. What do you classify them as, in your mind?

A. Actually, I think those awards are next important to the law review. The law review is of first-rate importance, but all awards which recognize attainment help in the process of stimulating friendly competition. Competition and friendly association are not by any means incompatible. In fact, they go together, a part of the business in preparing people to deal with the community as a whole. All of these awards step up competition in what I regard as a healthy manner.

Q. In your opinion, do you believe—first of all, you know about the University of Texas and its accreditation?

A. It is a thoroughly accredited school, a first-rate school in excellent standing, of course.

Q. Do you believe that a Negro student could get an equal education in a law school that started in Houston, Texas in [fol. 573] February of this year, moved to Austin in March of this year——

Mr. Daniel: We object to that part of the statement, because it is not in accordance with the facts of the case. They are entirely separate schools, Your Honor. There is no move of that school to Austin.

Mr. Marshall: I will change the question.

The Court: I believe I will let you—I believe I had better sustain his objection as to its moving.

Mr. Marshall: Yes, sir.

Q. Do you believe that a Negro could get a legal education in a law school which had been previously established in Houston, Texas, in February of this year, and was closed the same month, and another law school opened in Austin in March of this year, and the record further showing that that school would be moved to Houston in August of 1948; do you believe that a law school student, whether he be white or colored, could get an adequate education in a school, law school of that type?

A. I don't see how he possibly could.

Q. Well, of what importance is the stability of a law school?

A. Well, it has a human importance which we all recognize. If you settle down to study, you want to stay at least

a year, certainly at least a semester. Normally, when you start in, you plan to finish your course in the school that [fol. 574] you select, go right through. Occasionally there are occasions for moving, sometimes there are advantages. Certainly, the normal law student settles down to complete a course, and he can look three or four years ahead, depending on whether it is a three or four year course.

Q. Is the reputation of a law school of any value to the student, its reputation in the legal field?

A. To the student while he is a student?

Q. To the student while he is a student?

A. I think it is; it gives him confidence, pride, interest; it is a good deal of difference to the student if he feels he is in a good school, running well.

Q. Is the reputation of a law school of any value to the student after he graduates?

A. Well, we all know it may be of importance getting a job for a time. As one builds up a practice it may become of less importance, rank of the schools from which they come. Certainly, in the earlier stages of the lawyer's career, it may make a good deal of difference.

Q. You have heard the testimony about the so-called Negro Law School. I will ask you if a school which opened on March 10th in a—the ground floor of a building which had been leased for a period of one year, and in which there were three part-time professors to teach, and a library consisting solely of a hundred or two text reference books, could [fol. 575] give a Negro an education equal to that at the University of Texas?

A. May I ask one question there?

The Court: Yes.

A. May I ask what you mean by "opening"?

By Mr. Marshall:

Q. It opened on—that the doors were opened, and there was a person to register other students?

A. That is all you mean?

Q. Yes, that is all.

A. I don't see how it could, possibly.

Q. Then, I will ask you the next question. Is it possible to get a legal education equal to that at the University of Texas in a law school consisting of one student?

A. No, I should think not.

Q. In a law school consisting of ten students?

A. I think not.

Q. In a law school consisting of a hundred students?

A. One hundred students, how selected?

Q. One hundred Negro students?

A. No, certainly not.

Q. Well, would that type of school with one, ten or a hundred Negro students give a legal education substantially equivalent to that obtained at the University of Texas?

A. I should think not. I am a little troubled by your one hundred case, if you can imagine such a case, conditions [fol. 576] would be a good deal changed, but nothing I can visualize now would give substantial equality in any of the cases you supposed.

Q. Dr. Sharp, assuming a law school established in the basement of a building, ground floor, rather, of a building, and with a library of ten thousand volumes, assuming that they met the requirements of the Association of American Law Schools, and with three part-time professors, and from one to ten students, would that give education substantially equivalent to that at the University of Texas,—Negroes only?

A. I should think not.

Q. Dr. Sharp, a law school established in a building with three floors, assuming that the three floors are adequate in space, adequate in space to accom-odate ten students, and assuming further that a total budget of a hundred thousand dollars is spent for reconditioning and stacks, et cetera, would that type of law school give an education substantially equivalent to the Negroes there as that given other students at the University of Texas?

A. I think I have lost the trend of the question.

Q. The difference between the two questions is that one we have one floor and the other we have three floors, plus a library of ten thousand books, plus a budget of a hundred thousand dollars.

A. That budget is for repairs?

[fol. 577] Q. It is for everything.

A. Salaries?

Q. Including books, salaries, and everything else.

A. I should think not, by any means.

Q. Would your answer be changed if we added that there were four full-time professors there, and all Negro students, in the same situation?

A. Well, if you got four most eminent professors in the United States, about whose names I would have to think a little before I decided who they were, it is perhaps conceivable that this select group of Negroes would get an education that was at any rate comparable to that which the boys got, sizable classes with competition and so forth, at Texas, but I should think even then it unlikely, and I suppose no one school can hope to have the four greatest teachers in the United States, least of all, a new school, and least of all, one established under these conditions.

Q. Even with those circumstances, could you get the total community thinking in a school of that type?

A. I wouldn't think so. It would take extraordinary teachers, indeed.

Q. That is all.

Cross-examination.

Questions by Mr. Daniel:

Q. Dr. Sharp, would your answer to the questions just [fol. 578] asked you be changed if in the same situation you had two law schools, one for Negroes, one for whites, both law schools had exactly the same faculties, exactly the same facilities; by that, I mean the men of equal prominence and ability, and both of them had the same courses, the same number of students, the only difference between the two law schools being that the student body of one was made up of Negroes, the student body of the other made up of white students, the student bodies, however, being equal, I will ask you if, in your opinion it would be possible that the school for the Negroes would furnish substantially equal opportunities for training in law and procedure as the one for the whites?

A. May I ask about one of the conditions?

Q. Yes.

A. Where does the faculty have their offices?

Q. In exactly the same in one school as in the other?

A. I don't understand that.

Q. Sir?

A. Where do they do the most of their work?

Q. The same in the Negro school as in the white school. I am asking you a hypothetical question along the lines that you have had hypothetical questions on direct examination. In my question, everything concerning one school is the same as the other, identical, the only difference being that one is made up of white students, the other made up of [fol. 579] Negro students?

A. Well, I can answer the question, but I have still a doubt in my mind as to the conditions. As a teacher, I visualize certain things about that condition. I can't imagine operating from two offices equally.

The Court: It would probably be different teachers of equal standing.

By Mr. Daniel:

Q. Yes, sir, different faculty, but the total of the faculty such that even you would say that one was absolutely as good as the other?

A. Well, I should still say no.

Q. In other words, it is your opinion it is an absolute impossibility to set up a separate law school for Negroes, no matter how good a faculty, no matter how good a building, and no matter how good a library that would be equal to exactly the same kind of institution set up for whites?

A. No, I think I have avoided saying that. I recognize that some point of extraordinary faculty, and perhaps extraordinary equipment, might turn the balance. It is a point that hasn't been suggested to me in any realistic way by the questions.

Q. Where the faculty amounts to the same, you don't believe that the Negro school could furnish substantially equal opportunities as the white school, everything else being equal except that they are separate schools?

[fol. 580] A. No, for the reasons I have already explained.

Q. Then I will ask you if it is also your opinion that on the basis of the reasons that you have testified about, that in higher education that a separate school for girls can furnish, being exactly with the same faculty and all facilities, can furnish substantially equal educational opportunities as exactly the same but separate schools set up for men?

A. I thought you were—you asked me about co-education. I haven't answered.

Q. I believe that is the word.

A. Are you asking me about new colleges? You asked me to contrast women's schools with co-educational colleges.

Q. We are asking for the same opinion along the same lines we have been asking you about here this morning, where you have exactly equal facilities, as good a faculty, and all, in a separate women's college, separate from the men, whether or not in your opinion it would be possible, based on the reasoning that you have given here, for that school for girls to offer substantially equal opportunities for higher education as the separate school for men?

A. That is, they are both segregated?

Q. Segregation on each side.

A. You are not asking me to compare co-education?

Q. I am asking about separate.

A. Everything else being equal, I see no reason why the [fol. 581] separate school for girls should not have the same advantages and disadvantages that the separate school for men has. I happen to think this; co-education, other things being equal, is better.

Q. Let's take co-education. In your opinion, the mixed school, in so far as men and women are concerned, co-educational schools, in your opinion, can the separate schools for men and women furnish equal opportunities with the co-educational schools?

A. First, of course, they can and actually do, because you have cases where we know like Harvard and Bryn Mawr, very distinguished staff, and where work is done on a very high level. Other things being equal, I should prefer the situation in Chicago. It has the advantages of a non-segregated school. I should prefer the situation like we have in Chicago, where we have co-education.

Q. I am not asking what you prefer. I was asking if in your opinion substantially equal educational opportunities could be furnished in the separate school for women as could be furnished in co-educational schools, with all having the same type of faculty and facilities?

A. Other things being equal, I should think not, not as desirable.

Q. I asked you whether equal educational opportunities could be furnished. Is your answer the same on the opportunities that are afforded for equal education?

[fol. 582] A. Yes, other things being equal, the opportunities would not be equal in the segregated school as compared to the co-educational school.

Q. Have you ever taught school in Texas or any other southern state?

A. No.

Q. Have you ever gone to school in the south?

A. I trained in the south during the last war, taught flying in Miami, a teaching assignment.

Q. I mean in schools of higher learning?

A. No.

Q. Have you made any study of the schools of higher education in the south?

A. No, sir.

Q. Have you made any study of the attitudes of the people of the south on the question of segregation, regardless of the merits of those attitudes, or how they came about? Have you made any thorough investigation of what those attitudes, good or bad, are?

A. It depends on what you call study, or what you call thorough investigation. I haven't made the kind of study Dr. Thompson has made.

Q. You are not, then, fully acquainted with the attitudes as they relate to the possibility of mixed schools, are you, in the south?

[fol. 583] A. Not in the sense Dr. Thompson has.

Q. You don't feel qualified as an expert on whether or not the social attitudes in the south, good or bad, are such that mixed schools would work better than the separate schools, are you?

A. You are talking about schools at all levels?

Q. I am talking about higher levels, colleges; whether or not you are acquainted with those attitudes, or have made any study of those attitudes for the purpose of determining whether or not they would work better in the south, better in the separate schools, or in the mixed schools? In other words, are you willing to qualify as an expert on it? Do you feel like you have made the study necessary to give an expert opinion on that question?

A. I think I have made enough study of law schools and have spent enough time in them so that my opinion about mixed or segregated law schools——

Q. In the south?

A. South or north.

Q. I am talking about whether or not you have made any study of the attitudes of the people of the south, if you have made a thorough enough study to be acquainted with those attitudes and the influence they would have on the success of a separate law school?

A. I think I have some acquaintance, but I have not made [fol. 584] the kind of technical study Dr. Thompson made.

Q. You would not attempt to give this Court an expert opinion on that question today?

A. The question of education generally.

Q. The question of the attitudes of the people of the south as applied to the possibilities of the mixed schools being as successful as separate schools in higher education and fields of training?

A. If—I don't mean to fence with you, or be facetious, but I have not made any special study of race relations in the south.

Q. Back to your point as to a stimulating student body being one of the requirements for, in your opinion, for a good law school, I will ask you, Dr. Sharp, if you will not agree that the attitudes of all of the members making up that student body, social attitudes, whether they be good or bad, or regardless of where they came from, if those social attitudes will not have some bearing on the stimulating study body that you are talking about?

A. Surely.

Q. Will those not also have some bearing on whether or not the student in a mixed school would have the same encouragement or help from upper classmen as he would receive in a separate school?

A. Surely.

[fol. 585] Q. You will agree also that the attitudes, whether good or bad, of course, will have some bearing on the support of the institution involved in a southern state, won't you, the State support given to them, and the support of individual citizens?

A. I think you have disqualified me to testify in this crowd. I am not an expert——

Q. I will ask you if you don't know enough about it in general to know that the social attitudes in any state will have some bearing on the support given a mixed school in that state?

A. I do not know more about this subject than—it is the same sort of general acquiring of knowledge that I have

about race relations in the south. If you want me to speak about it on the same sort of qualifications, I am willing to, but I am not willing to leave the other question and——

Q. I will withdraw that question. Now, you talked about the various benefits of the case system, one of them being the chance, the opportunity for the student to recite, to report on the work that they have done on the particular cases assigned. That is one of them, is it not?

A. One of them, only one.

Q. Only one. Beginning with that one, all other things being equal, I will ask you if it isn't true that in a class made up of 125 students, that a smaller percentage of the [fol. 586] students will have an opportunity to recite and report on each case than in a class made up of ten students during a one hour period, the same period of time?

A. In a very mechanical sense, that is true.

Q. And is it not true that a greater percentage in the smaller class will have an opportunity to discuss and criticize the case and be heard from on the case than in the larger class?

A. I would rather say no, not necessarily, but in a mechanical sense, it is conceivable, if you divide up the minutes you will get some such result as that, but I don't think that touches the real point.

Q. On that one point, regardless of what you would rather say, the truth is that you would have to say yes, as far as the greater percentage of students having a chance to, the time in which to comment on each of the cases assigned?

A. May I explain my qualification?

Q. As soon as you answer the question.

A. In a mechanical sense, yes.

Q. Yes.

A. But I don't know how you could with 30 or 40 fellows all wanting to be heard, which happens in a good class. They can't all talk. When you have a good class, you see all sorts of people ready to say something all at once. Of course, they can't all talk. That is the kind of class that goes well.

Q. In a class of 125, they can't all talk, can they?

[fol. 587] A. No, but they can all be ready to, in a really good class.

Q. They can all be ready to in a really good class. In a class of ten they can all be ready to, can't they?

A. Yes, they can, but I am not so sure it is likely.

Q. It is possible they can all be ready?

A. Yes.

Q. And it is possible to call on more of them than in a class of 125 during an hour's class?

A. In a mechanical way, yes. It is a very good feeling for them all to want to talk.

Q. From the standpoint of the professor?

A. And the standpoint of the student.

Q. You mentioned that with first year students you had found tutorial work to be successful?

A. Yes.

Q. What do you mean by tutorial work?

A. Work which is conducted with us by a special staff of younger men in the preparation of papers on problems, the examination of those papers by the tutorial staff, and instruction in the art of writing, using language, as well as in the art of legal research, building up a case, doing some productive work on one's own.

Q. Derived from the old tutor system of instruction?

A. It has been used very successfully in the English universities.

[fol. 588] Q. And that system is applied to the individual student?

A. Yes.

Q. The tutor works with the individual student?

A. Yes.

Q. You have found that quite successful, you say, with first year students?

A. In this form, this form of promoting the development of individual skills and talents and capacities by the assignment or awarding pieces of work.

Q. That system, that tutor system that you have spoken of as being successful with first year students, comes much nearer to operating that law school with one student than any other system you have described here today, does it not?

A. Oh, I think not. I think what I said about the value of competition in the class room, and outside the class room, applies to this sort of thing. Boys get together. We don't prohibit them from talking over their papers together. We desire it sometimes by groups.

Q. In a law school with one law student, the type of instruction will be nearer the tutorial type than the lecture type, wouldn't it?

A. Not necessarily, at all.

Q. It could be, though, you will agree?

A. I don't see any special likelihood of it. There is an equal likelihood that the student would begin to lean on the [fol. 589] one professor. It is quite as likely to develop into a rather casual lecture. It is easy to lecture one student.

Q. It would be similar to your tutorial system with the one student?

A. I think it would be very different. Our tutorial system depends on the work over an extended time, with particular problems, developing skills in a school of some size where there is enterprise. I see no real similarity between the essential character of the tutorial system and a school with one student.

Q. No connection. On your question a minute ago, and your answer about a law school moving, you don't mean to state to the Court that in your opinion that if Harvard Law School moved to another city in the State of Massachusetts that that would cause any inequality to a one year law student who had been there only the year before the move, do you?

A. If the move is in the middle of the year?

A. No. At the end of the year.

A. The question was about the middle of the year.

Q. Did you think Mr. Marshall's question a minute ago about the move of the proposed Negro Law School, that he meant that it would come in the middle of the year, school year?

A. It came in a month, as I recall it, which is normally in the school year.

Q. And your assumption is that that date was in the mid[fol. 590]dle of the school year; right?

A. Yes, sir, on that, but I don't think that is the only factor in my answer.

Q. Now then, if the Harvard Law School moved at the end of the school year, the student who had been there during his first year's work, only his one year, do you feel it would be any inequality to him at all if the school happened to move to another city in Massachusetts where he was allowed to continue his work under the same direction?

A. I can hardly imagine such a move being made for anything but a good reason, and I don't imagine it would do the student any harm.

Q. The same would be true of any other good law school that made a move at the end of the year, all other things being equal, that would cause no particular disadvantage to the student?

A. The same thing would be true of any first-rate school.

Q. I said, substantially equal.

A. It is hard to visualize, but I can't imagine such a case.

Q. We will imagine such a case. Is it your answer it would do him no harm, or furnish no inequality by such a move?

A. Harvard goes from Cambridge to Northampton, Massachusetts, leaving the University. It is a hard case to think of, but——

Q. We have already effected the move. I am asking you about a move of any law school substantially equal to Harvard Law School, if it moved at the end of the school year [fol. 591] to another location, whether or not in your opinion that would cause any disadvantage or inequality to the first year law students who had been enrolled in that school?

A. I suppose it would cause some inconvenience, all right, but no disadvantage.

Q. That is all.

Redirect examination.

Questions by Mr. Marshall:

Q. Dr. Sharp, if Harvard should move this year, it would be after how many years at the same stand?

A. About 120 years.

Q. That is all.

Mr. Daniel: That is all.

(Witness excused.)

The Court: We will resume at two o'clock.

Court was recessed at 12 o'clock noon, May 16, 1947, until 2 o'clock p. m., May 16, 1947.

[fol. 592] AFTERNOON SESSION

May 16, 1947

2:00 P. M.

Mr. Daniel: You have rested?

Mr. Durham: Yes.

PRESENTATION OF AUTHORITIES

Mr. Daniel: Now, Your Honor, I would like to present the authorities I have mentioned before going back to Henry Doyle's testimony. I do apologize for asking the Court to change its ruling on the matter, but I would like for the Court to consider the purpose.

The Court: All right.

Mr. Daniel: In the first place, it bears on the point that there are no students in the school. We really believe, Your Honor, that the relator has made quite an issue of the fact that no students are in there, and especially the situation where there is only one student there, all through this case.

We also think that there is no question that the evidence shows the National Association for the Advancement of Colored People are giving active assistance to relator, but I would like for the record certainly to show that we make no objection to it, and think that it is only proper that they do render that help, if they think relator's case is right.

The only thing we point out about the National Association for the Advancement of Colored People, and the chain [fol. 593] of evidence being in the attempt to show the discouragement given by that association to students in the school, given not only by the association, but by the attorney for relator, whose acts certainly do have a bearing, him being in that position with relator.

Now, we have direct evidence in the case, Your Honor, showing this. We have direct evidence in the case by the relator himself that when he received his notice about the school being open, that he didn't make up his own mind about whether he would attend, but went to his attorney in Dallas to make the decision. His attorney in Dallas testified that he did not make any investigation of this school down here, but he called Maceo Smith, and Maceo Smith was shown to be the Secretary for the National Association for the Advancement of Colored People here in Texas. That upon the report received within four or five days from

Maceo Smith, Mr. Durham and the relator made up their minds that he would not enter. Therefore, we have the direct evidence of at least some influence.

We could not go into what the report was, but some influence of the association bearing on at least one student not going to the school, the relator here himself. We feel that any other evidence as to another prospective student, the fact that he was mentioning going, and he didn't go, even though it is circumstantial evidence, it would certainly have a bearing in this case.

[fol. 594] Yet, Your Honor may not consider any of that evidence. If this case is appealed by whichever side loses the case, I am just thinking about if some other court might not wonder what about other students. We at least have one on whom we offer circumstantial evidence.

I would like to read from about three authorities on circumstantial evidence in cases of this kind. In the first place, quoting from two Texas cases by the Supreme Court of Texas, the general rule stated in those two cases is as follows:

> "As a general rule, in the absence of direct evidence, evidence of any circumstance, however slight, which conduces or tends in any degree to establish a material fact, or which affords fair presumption or inference to the question in dispute is relevant and admissible."

And from Texas Jurisprudence I quote:

> "It is not necessary that the fact sought to be proved should have direct reference to the main issue and however remote from the main issue, it is proper to submit such issue if the evidence refers to a fact relevant to a fact in issue."

And then Duke v. Houston Oil Company, a recent case, this statement:

> "Generally, any conclusion may be based upon cir-
> [fol. 595] cumstantial evidence, and fact that evidence is circumstantial does not render it incompetent. Where it is sought to prove an ultimate fact by a chain of circumstances every circumstance should be considered."

And then I quote from McCormick and Ray on Evidence:

"A design, plan or intention may also be evidenced circumstantially by conduct showing it. The kinds of conduct usable for this purpose are infinite in variety, but the decided cases deal with comparatively few of them. In general, however, it may be said that any act which under the circumstances and in the light of experience would indicate a probable design, is admissible."

We admit readily that we do not have direct evidence from Henry Doyle that the National Association for the Advancement of Colored People persuaded him to make up his mind not to enter the law school on March 10th, but we do feel like his evidence contains certain circumstances such as this that are important. First, for instance, where he resides, and that he was considering prior to March 10, 1947 this new law school, and entering it. That while he was still considering this school he attended a meeting of others of his race, including Maceo Smith, the Secretary—shown by the evidence to be Secretary of the N. A. A. C. P., [fol. 596] in Dallas, while still considering whether or not he would attend this school, at that meeting. Mr. Durham, attorney for the relator, appeared before that meeting, and that the witness, Henry Doyle, on March 10th, did not enter the school. No direct evidence, but Your Honor, it does show that in making up his mind he was in a meeting with the same people, Mr. Durham and Maceo Smith, that made up the mind or helped influence one student not to go to the school, and we think those circumstances are at least, maybe only slight, but they bear in a way in explaining at least what one prospective student did in making up his mind, and the fact that he did not finally enter the school; that that conduct in the meeting in Dallas is admissible for the purpose of showing at least what one other student who did not enter did about considering the matter.

The Court: And you re-tender the evidence of Doyle?

Mr. Daniel: Yes, sir, we re-tender the evidence of Doyle, that particular portion of it that is on the point that I have outlined here to the Court. Some of it is not admissible, of course, but only the points that are not objectionable on some other ground.

The Court: I think I will give you your bill.

Mr. Daniel: Note our exception.

The Court: Have you anything further?
Mr. Daniel: That is all, Your Honor.
Mr. Marshall: We are through.

Testimony closed.

[fol. 597] RESPONDENTS' EXHIBIT No. 1

Standards of the American Bar Association

(1) The American Bar Association is of the opinion that every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition to admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years' duration if they devote substantially all of their working time to their studies, and a longer course equivalent in the number of working hours, if they devote only a part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

(e) It shall not be operated as a commercial enterprise and the compensation of any officer or member of its teaching staff shall not depend on the number of students or on the fees received.

(f) It shall be a school which in the judgment of the Council of Legal Education and Admissions to the Bar [fol. 598] possesses reasonably adequate facilities and maintains a sound educational policy; provided, however, that any decision of the Council in these respects shall be subject to review by the House of Delegates on the petition of any school adversely affected.

[fol. 599] RESPONDENTS' EXHIBIT No. 2

Resolution

Minute Order No. 203-46

ESTABLISHMENT OF LAW COURSE FOR NEGRO STUDENTS

On motion by Mr. Buchanan, seconded by Mr. Reese, and approved by a majority vote of the Board, the following resolution is adopted.

Whereas, by Senate Bill No. 228 of the 49th Legislature the name of Prairie View State Normal and Industrial College at Prairie View was changed to Prairie View University; and

Whereas, the act further provides that whenever there is any demand for same the Board of Directors of the Agricultural and Mechanical College of Texas is authorized to provide for a course in law at Prairie View University substantially equivalent to that offered at the University of Texas; (Other courses not pertinent to this order were also authorized.) and

Whereas, the Board of Directors of A. & M. College in cooperation with the University of Texas named a joint committee to study the obligations of these institutions in connection with Negro education and made a report to the Governor in connection therewith, said, (Minute Order No. 124-46), being attached to and made a part of this order; and

Whereas, the Board of Directors of the A. & M. College [fol. 600] of Texas stongly reaffirms the position taken in the recommendations made to the Governor, particularly that part which urges the establishment of a first-class University for Negroes, preferably at Houston, Texas, under the supervision of the Board of Regents of the University of Texas; and

Whereas, it has been brought to the attention of the Board of Directors that at this time there is pending an application for admission to the University of Texas by one or more colored youth seeking to enroll in the School of Law, and this Board has been requested to make arrangements for these young men to embark on their legal studies pending final action by the Legislature on the recommendations made or to be made to its 50th session; and

Whereas, the Board of Directors has by investigation determined that arrangements may be made for standard courses of first-year law to be given in Houston, Texas with qualified Negro lawyers as teachers:

Therefore, be it resolved

1. That if the applicant and/or similar other applicants for first-year courses in law offer themselves to the Registrar at Prairie View University, bringing with them a suitable transcript and a certificate from the Dean of the Law School of the University of Texas that they are scholastically prepared for a course of law equivalent to that given [fol. 601] at the University of Texas, they will be admitted to Prairie View University for the semester begining February 1947.

2. The course will be offered in Houston, Texas and will be substantially the same approved course as is now offered by the University of Texas School of Law for entering students, and the qualifications of the personnel to teach the students will be determined by the State Board of Law Examiners, and they will be judged acceptable by it before instruction begins.

3. The Board of Directors of A. & M. College, through Prairie View University, will provide instruction in accordance with the requirements of the Supreme Court of Texas and the American Bar Association, and will provide or make available to the students such books or library material as are needed for the first-year course in which they will be enrolled. The Governor will be asked for a deficiency appropriation to provide the cost of instruction.

Certificate

I, E. L. Angell, certify that the foregoing is an exact copy of Minute Order No. 203-46 passed at the meeting of the Board of Directors of the Agricultural and Mechanical College of Texas held at Austin, Texas on November 27, 1946.

[fol. 602] In witness whereof, I have hereunto affixed my hand and seal of the said institution this 4th day of December 1946.

(S.) E. L. Angell, Secretary, Board of Directors, Agricultural and Mechanical College of Texas
(Seal.)

[fol. 603] RESPONDENTS' EXHIBIT, No. 3

Resolution Adopted by the Board of Regents of the University of Texas

Re: The Texas State University for Negroes.

Adopted February 28, 1947

Resolution—Re: The Texas State University for Negroes

Chairman Woodward presented the following resolution re The Texas State University for Negroes, as was proposed in Senate Bill No. 140, 50th Legislature of Texas, which resolution was adopted unanimously by the Board upon motion of Mr. Bullington, seconded by Mr. Kirkpatrick. The roll call reflected the following vote:

Aye:	No:
Judge Woodward	
Mr. Bullington	
Mr. Kirkpatrick	
Dr. Scherer	
Mr. Schreiner	
Mr. Tucker	
Mr. Warren	

Whereas, Senate Bill No. 140, being an Act to establish a University of the First Class to be styled "The Texas State University for Negroes" has been passed finally by [fol. 604] both Houses of the Legislature of the State of Texas now in Session, and

Whereas, it is anticipated that said bill will be signed forthwith, and will, by its terms, become immediately effective, and

Whereas, Section 11 of the said Act provides that "The Board of Regents of The University of Texas is authorized and required to forthwith organize and establish a separate school of law at Austin for Negroes to be known as the 'School of Law of The Texas State University for Negroes' and therein provide instruction in law equivalent to the same instruction being offered in law at The University of Texas;" and

Whereas, The Board of Regents of The University of Texas desires to cooperate fully and immediately in carry-

ing out in good faith all of the duties imposed upon it by said bill, and

Whereas, The Dean and the Members of the Staff of the School of Law of the University of Texas have signified their willingness and desire to cooperate fully in the establishment and conduct of said School of Law of The Texas State University for Negroes to the end that the instruction therein given may be in all respects equivalent to that currently and heretofore offered in the School of Law of The University of Texas; and

[fol. 605] Whereas, The Registrar of The University of Texas has signified his willingness and desire to cooperate in the organization and conduct of the School of Law of The Texas State University for Negroes as contemplated in said bill, now, therefore;

Be It Resolved, That the Board of Regents of the University of Texas hereby assumes and undertakes to discharge promptly and in full compliance with the letter and the spirit of Section 11 of said bill all of the duties and responsibilities imposed upon or delegated to it by the terms thereof; and

Be It Further Resolved, That the Chairman of the Board of Regents of The University of Texas be, and he is hereby authorized, immediately upon said law taking effect, to take all steps necessary to acquire in the immediate vicinity of the State Capitol at Austin, Texas, quarters fully adequate for the conduct of the School of Law of The Texas State University for Negroes and to do all other acts and things, including the employment of necessary personnel, the acquisition of furniture and other facilities and utilities necessary to the full equipment and operation of said school;

Be It Further Resolved, That the first semester of said school begin on Monday, March 10, 1947, which is hereby designated as the final date for registration therein and that [fol. 606] such semester extend through June 28, 1947, and

Be It Further Resolved, That the Dean of the School of Law of The University of Texas be, and he is hereby, requested and directed to discharge the duties of Dean of the School of Law of The Texas State University for Negroes.

Be It Further Resolved, That there shall be offered for students entering such school the identical courses now being taught the same classes in the Law School of The University of Texas, which courses shall be given by the same instructors or instructors of equivalent experience and

ability with those now giving such courses in the Law School of The University of Texas;

Be It Further Resolved: That the Registrar of The University of Texas be, and he is hereby, requested and directed to discharge the duties of the Registrar of the School of Law of The Texas State University for Negroes and in that capacity to distribute forthwith to all persons who may be interested therein bulletins covering the work to be offered in the semester opening March 10, 1947, which bulletins shall contain the information customarily contained in bulletins issued by The University of Texas and which may be compiled by incorporating by reference material contained in the bulletins heretofore issued by The University of Texas;

Be It Further Resolved, That the Chairman of The Board [fol. 607] of Regents of The University of Texas be, and he is hereby, authorized and directed to purchase for the account of The Texas State University for Negroes a library with necessary cases and appurtenances sufficient to meet the requirements of the American Law School Association and of the American Bar Association;

Be It Further Resolved, That pending receipt and installation of such library, the Dean of the Law School of The University of Texas be, and he is hereby, authorized to supply on a loan basis books from the Law Library of The University of Texas which may be needed in the efficient conduct of the School of Law of The Texas State University for Negroes;

Be It Further Resolved, That the Chairman of the Board of Regents be, and he is hereby, authorized to negotiate with the personnel of said proposed school such arrangements as may be required for its immediate organization and conduct, which arrangements shall be reported to the next meeting of the Board of Regents for confirmation and approval by it;

Be It Further Resolved, That the Board of Regents of The University of Texas extends to the Board of Directors of The Texas State University for Negroes when it shall have been duly constituted, its best wishes and assurances of cooperation for the success of the undertaking committed to its care.

[fol. 608] THE STATE OF TEXAS
County of Travis

I, Betty A. Thedford, Secretary of the Board of Regents of The University of Texas, do hereby certify that the foregoing is a true and correct excerpt from the minutes of a regular meeting of said Board of Regents held in Austin, Texas, on February 28 and March 1, 1947, at which a majority of the members were present and voted favorably on the motion contained therein.

Executed under my hand and the seal of The University of Texas this the 18th day of March, 1947.

(S.) Betty A. Thedford, Secretary of the Board of Regents of The University of Texas.

(Seal of the University of Texas.)

THE STATE OF TEXAS
County of Travis

Before me, the undersigned authority, on this day personally appeared Betty A. Thedford, Secretary of the Board of Regents of the University of Texas, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the [fol. 609] same for the purpose and consideration therein expressed, and in the capacity therein stated.

Given under my hand and the seal of office this the 18th day of March, A. D. 1947.

(S.) Maryvenice E. Stewart, Notary Public in and for Travis County, Texas. (Notary Seal.)

[fol. 610] RESPONDENTS' EXHIBIT No. 6

School of Law, The University of Texas

Full-time faculty members:

Bailey, E. W.—Professor of Law. B. A. 1920, LL. B. 1928, S. J. D., 1942. At University since 1930.

Davis, Kenneth C.—Professor of Law. A. B. 1931, LL. B. 1934. At West Virginia 1935-40, at U. T. since 1940.

Fritz, W. F.—Asst. Professor of Law, B. A. 1935, M. A. 1938, LL. B. 1946. Taught seven years in Texas High Schools, at U. T. since 1946.

Hodges, Gus M.—Professor of Law, B. B. A. 1930, LL. B. 1932. At U. T. since 1940.

Hudspeth, C. M.—Assistant Professor of Law. B. A. 1940, LL. B. 1946. At U. T. since 1946.

Huie, W. O.—Asst. Dean and Professor of Law. B. A. 1932, LL. B. 1935. At U. T. since 1936.

Leary, Leo W.—Associate Professor of Law. B. A. 1940, LL. B. 1945, LL. M. 1946. At U. T. since 1946.

McCormick, C. T.—Dean and Professor of Law. B. A. 1909, LL. B. 1912. At U. T. 1922-26. At North Carolina 1926-31. At Northwestern 1931-40. At U. T. 1940.

Morris, Clarence—Professor of Law. LL. B. 1925, LL. M. 1926. At Univ. of Wyoming 1926-40. At U. T. since 1940.

Moriss, S. T.—Assistant Professor of Law, LL. B. 1946. At U. T. since 1946.

Stayton, R. W.—Professor of Law. B. A. 1907, LL. B. 1927. At U. T. since 1925.

[fol. 610a] Stumberg, G. W.—Professor of Law. B. A. 1909, LL. B. 1912, J. D. 1924. At Louisiana State Univ. Law School 1919-25. At U. T. since 1925.

Wade, John W.—Visiting Professor of Law. A. B. 1932, LL. B. 1934, LL. M. '35, S. J. D. 1942. At Univ. of Mississippi 1936-46. At U. T. 1946-47.

Walker, A. W., Jr.—Professor of Law. B. A. 1921. LL. B. 1923. At U. T. since 1925.

Williams, Howard R.—Associate Professor of Law. A. B. 1937, LL. B. 1940. At U. T. since 1946.

Williams, Jerry S.—Associate Professor of Law. A. B. 1938, LL. B. 1941. Instructor in Law Univ. of Iowa 1941-42. Asst. Prof. of Law, Univ. of Denver 1946. At U. T. since 1946.

Woodward, M. K.—Associate Professor of Law. B. A. 1933, M. A. 1940, LL. B. 1943. Teacher in Texas Public Schools 1935-41. At U. T. since 1946.

Part-time Faculty Members:

Hargrave, Miss Helen—Instructor of Law and Law Librarian. LL. B. 1926. At U. T. since 1930.

Patterson, W. W.—Director of Legal Aid Clinic. LL. B. 1936.

Ynsfran, P. M.—Lecturer in Law. Bachiller en Ciencias y Letras, Escribano Publico. Lecturer in Law at U. T. part time since 1945.

(Fall of 1946—Tisinger, D. L.—Lecturer in Law. A. B. 1935, LL. B. 1939. (Lecturer in Law part-time since 1944.))

[fol. 611] RESPONDENTS' EXHIBIT No. 7

Announcement of Courses for the Spring Semester, 1947, of the School of Law of the Texas State University for Negroes

The School of Law will begin its program of instruction March 10, 1947. It is located in the building at 104 East 13th Street, Austin, Texas, adjoining the grounds of the State Capitol.

For beginning students, the courses for the Spring Semester will be as follows:

Contracts, six hours per week. Instructor, Leo W. Leary, Associate Professor of Law, The University of Texas (A. B., LL. B., University of Wisconsin.) Casebook: Grismore's Cases on Contracts.

Torts: six hours per week. Instructor, Starling T. Morris, Assistant Professor of Law, The University of Texas, (LL. B., The University of Texas). Casebook: Thurston & Seavey, Cases on Torts.

Legal Bibliography, one hour per week. Instructor, Chalmers M. Hudspeth, Assistant Professor of Law, The University of Texas (A. B., Rice Institute; LL. B., The University of Texas.) Casebook: Brandt, How to Find the Law.

[fol. 612] All of these instructors are teaching or have taught the same courses in The University of Texas School of Law during the current school year, and the program of courses is identical with those offered to beginning students in that school who entered February 1, 1947.

Registration day for the Spring Semester is March 10, 1947. Classes will begin on that day. The semester ends June 28. Programs of work for the summer session and for the fall and subsequent semesters will be announced later and will conform, generally, to the programs and offerings of the Law School of The University of Texas.

The State Library, which includes the Library of the Supreme Court of Texas, located in the State Capitol, is for the time being designated as the Library of the School. This contains about 44,000 volumes of legal material and includes all of the statutes and reports of decisions of all the states and of the United States.

The reference books needed for immediate use in the classes are available in the school building, and any other books which may be required, if not available in the State Library, will be furnished as needed from the Library of the School of Law of The University of Texas. A collection of 10,000 carefully selected volumes meeting the requirements of the Association of American Law Schools, to con-
[fol. 613] stitute the nucleus of the permanent library of the School has been ordered.

Requirements for admission, fees, and regulations relating to the classification of students, class-work, and examinations, grades and credits, standards of work required, and degrees awarded, are the same as those contained in the attached Catalog of the School of Law, dated August 1, 1945, which is the latest published catalog of that school.

For further information apply to Charles T. McCormick, Dean or E. J. Mathews, Registrar, School of Law, Texas State University for Negroes, Austin, Texas.

[fol. 614] RESPONDENTS' EXHIBIT No. 13

The School of Law of The Texas State University for Negroes

Box E, University Station

Austin 12, Texas,
March 3, 1947.

Mr. Heman Marion Sweatt, 3402 Delano Street, Houston, Texas.

DEAR SIR:

Since our last correspondence concerning your application for admission to the University of Texas Law School, the Texas Legislature has authorized the Board of Regents of the University of Texas to establish and operate a sepa-

rate school of law equal in all respects to the University School of Law.

I am pleased to advise that your qualifications heretofore established and your application heretofore made will entitle you to attend the new school now being opened at 104 East 13th Street, Austin, Texas.

The new school, known as The School of Law of the Texas State University for Negroes will open March 10, 1947, and the first semester will run until June 28, 1947. A [fol. 615] summer session is being planned which will allow you to complete the same amount of work prior to the semester beginning in September as would be possible at the University of Texas.

Dean Chas. T. McCormick of the University of Texas Law School will serve as Dean of the newly established Law School and the courses and instructors will be identical with those available at the University of Texas Law School. I assure you that in accordance with the authority from the Legislature and the Board of Regents, the newly established school will offer the students thereof equal training and educational opportunities. The school is located directly across the street from the State Capitol Building. A library is being installed and full use of the State Library on the second floor of the Capitol building is available for research prior to the delivery of a complete law library now on order. This new library will include all books required to meet the standards of the American Association of Law Schools and the American Bar Association.

There is enclosed a copy of the current bulletin of the Law School of the University of Texas, which has been adopted as the bulletin and list of courses available at the new School of Law. The courses, texts, collateral reading, standards of instruction and standards of scholarship will be identical with those prevailing in the Law School of the [fol. 616] University of Texas. Since your application is for a first year law course, I might add that in the University of Texas Law School first year students are eligible to take Contracts (6 hours weekly), Torts (6 hours weekly), and Legal Bibliography (1 hour weekly.) These same courses will be available to you by the same instructors.

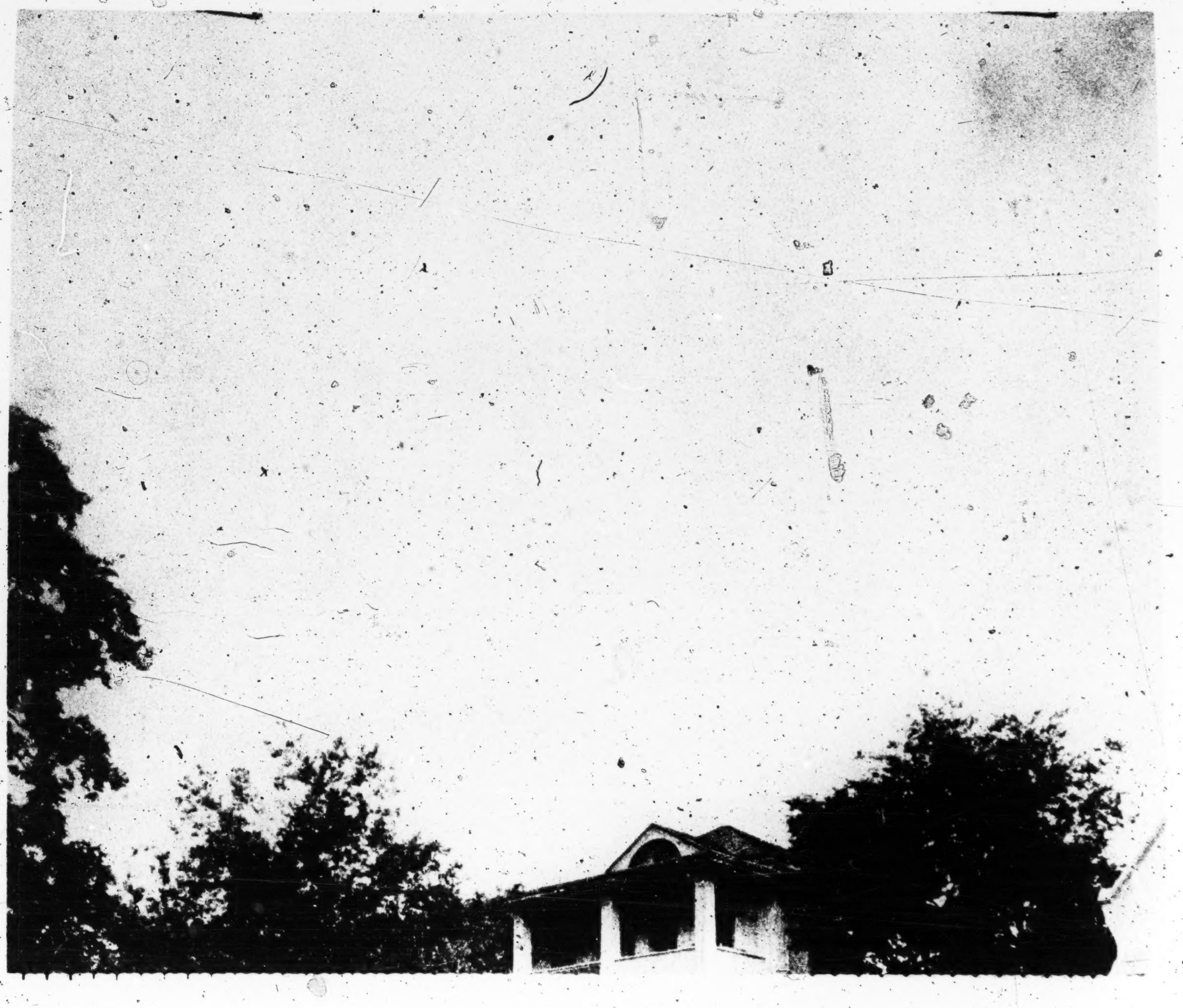
If you desire to enter the semester beginning March 10, please advise me as soon as possible in order that arrangements may be made for you to interview Dean McCormick

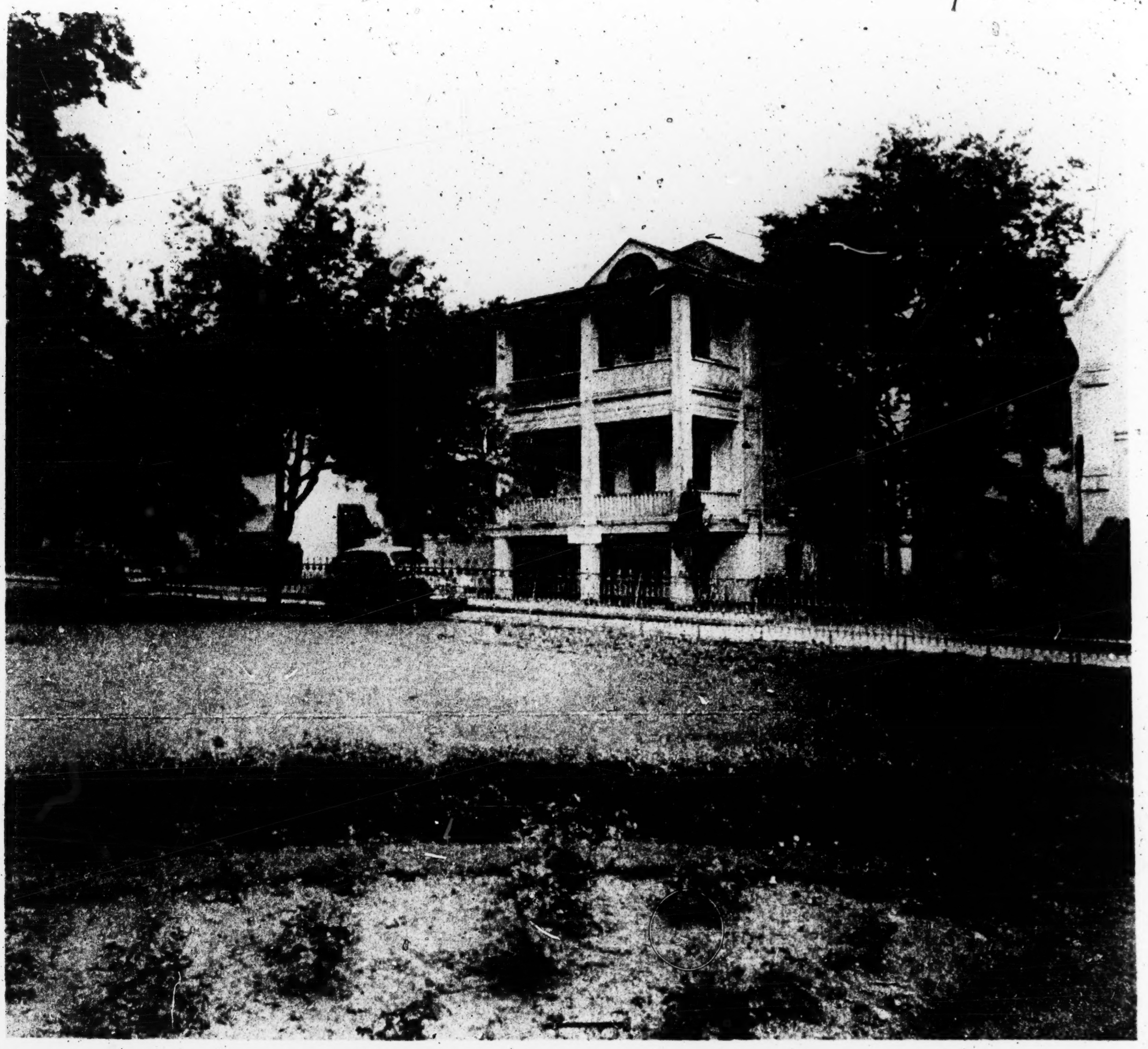
and determine your schedule of classes and textbooks which will be required.

Yours very ruly, (S.) E. J. Mathews, Registrar.

(Here follows 1 Photolithograph, side folio 617)

RESPONDENTS' EXHIBIT NO. 14





[fol. 618] RELATOR'S EXHIBIT NO. 1

(Cover Title, as follows:)

Association of American Law Schools, 1945, Handbook

(From page 259 of Handbook.)

IV. Articles of Association

(From Handbook, beginning at 7th paragraph on page 260, ending last line on page 267.)

Sixth. Law Schools may be elected to membership at any meeting by a vote of the Association, but no law school shall be so elected unless for at least two years immediately preceding its application it has complied with the following requirements:

(Amended 1925: see Proceedings, 1925, pp. 6 to 12.)

1. It shall be a school not operated as a commercial enter-
[fol. 619] prise, and the compensation of any officer or member of its teaching staff shall not depend on the number of students, nor on the fees received.

(Adopted 1922; see Proceedings, 1922, pp. 64-66.)

2. (a) It shall require of all candidates for any degree, other than special students, at the time of the commencement of their law study, the completion, in residence, of one-half of a four-year course of study acceptable for a Bachelor's degree at the State University of the state in which the pre-law work is taken, or in the event there is no State University then at a principal college or university located therein; except that not more than ten per cent of the credit presented for admission may include credit earned in non-theory courses in military science, hygiene, domestic arts, physical education, vocal or instrumental music or other courses without intellectual content of substantial value.

Pre-legal work done in residence within the meaning of Article Sixth, Section 2 (a), shall mean work done in class in an approved college, or, if done off the campus of the college, it shall mean work done in a class meeting in regular sessions each week under the personal supervision and instruction of a member of the instructional staff of an approved college.

(Approved by the Association by mail vote, September, [fol. 620] 1944.)

(b) A student's pre-legal work must have been passed with a scholastic average at least equal to the average required for graduation in the institutions attended, and this average shall be based on all the work undertaken by the student in his pre-law curriculum, exclusive of non-theory courses in military science, hygiene, domestic arts, physical education, vocal or instrumental music, or other courses without intellectual content of substantial value.

(c) It shall require from each student admitted a written statement as to his previous attendance at other law schools, and as to his previous applications for admission to other law schools.

(Amended 1927; see Proceedings 1927, pp. 9-20, 53, 54. Amended 1935; see Proceedings 1935, pp. 11-13. Amended, 1937, see Proceedings, 1937, pp. 29-37.)

3. A school whose curriculum and schedule of work are so arranged that, in the opinion of the Executive Committee, substantially the full working time of its students is required for the work of the school, shall be considered a full-time school. A full-time school shall require of its candidates for the first degree in law resident study of law during a period of at least ninety weeks and the successful completion of at least ten hundred and eighty hours of classroom instruction in law.

[fol. 621] A school whose curriculum and schedule of work are so arranged that, in the opinion of the Executive Committee, substantially the full working time of its students is not required for the work of the school, shall be considered a part-time school. A part-time school must maintain a curriculum which, in the opinion of the Executive Committee, is the equivalent of that of a full-time school. The action of the Executive Committee under this paragraph shall in each instance be reported to the Association at its next annual meeting and shall stand as the action of the Association until set aside by a vote of a majority of all the members of the Association.

Any school now or hereafter a member of the Association, that conducts both full-time and part-time curricula, must comply as regards each with the requirements therefore as set forth in the preceding paragraphs.

No school shall be or remain eligible to membership if the institution of which it is a part shall through any other agency conduct instruction in law designed to prepare students for admission to the Bar or for Bar examinations, save in conformity with the provisions of the preceding paragraphs.

No school shall be or remain eligible for membership if it accepts for credit toward the first degree in law, with or [fol. 622] without examination in such school, work taken in another American law school which at the time the credit was earned was not either a member of this Association or approved by the American Bar Association; provided, however, that credit may be given for work taken in another American Law school within the two-year period immediately preceding its admission to this Association.

(Amended December 31, 1936. See Proceedings, 1936, pp. 27-31; 91-96. Amended December 29, 1938. See Proceedings, 1938, pp. 24-28.)

At the sixteenth annual meeting the Executive Committee reported as follows, concerning Article VI (2):

"Some doubts have arisen as to whether Article VI (2) requires the three years' study to be in residence. These doubts appear to have been caused in part by certain resolutions passed in 1907 and 1908 before subsection 2 was amended in its present form. In order to set at rest these doubts the Committee offers the following resolution:

"Resolved, That the period of study required by Art. VI.(2) is to be interpreted as meaning resident study." (The foregoing resolution was adopted. See Proceedings, 1916, p. 82.)

4. The conferring of its degree shall be conditioned upon [fol. 623] the attainment of a grade of scholarship ascertained by examination.

"Resolved, That no student should be unconditionally advanced from one class to a higher one without passing satisfactory examination upon the studies previously pursued by the former class. (Adopted, Proceedings, 1902, p. 7.)

"It was the sense of the Committee that final examinations under the rule should not be considered as required

in practice court and in courses involving the drafting of legal instruments, but that as to such courses as legal bibliography, a final examination might very well be expected. The general principle was declared to be that final examinations should be required in all courses reasonably susceptible thereto." (Exec. Com. Report, 1923.)

5. Students with less than academic credit required of candidates for the law degree by Section 2 of this article, may be admitted as "specials" provided:

a. They are at least twenty-three years of age, and

b. There is some good reason for thinking that their experience and training have specially equipped them to engage successfully in the study of law, despite the lack of the required college credits, and

c. The number of such "specials" admitted each year [fol. 624] shall not exceed ten per cent of the average number of students admitted by the school as beginning regular law students during the two preceding years.

(See Proceedings, 1927, pp. 55-59.)

In 1928 a ruling of the Executive Committee relative to Article VI (2d) was approved, under which the requirement of two years of college work was made to apply to summer sessions where credit is given to any student toward his law degree. (See rulings and annotations to Art. VI (2d).)

The following interpretation by the Executive Committee was approved:

In estimating the ten per cent to determine the number of special students that may be admitted, fractions are not to be counted. (See Proceedings, 1927, p. 9.)

In calculating the number of special students who may be admitted under Article Sixth, Section 5, it shall not be necessary to include members of the bar who are enrolled in courses without expectation of academic credit.

(Approved by the Association by mail vote, September, 1944.)

6. Commencing September 1, 1932, it shall own a law library of not less than ten thousand volumes, which shall be so housed and administered as to be readily available for use by students and faculty. Commencing September 1, 1940, it shall have, in addition to the four instructors speci-

[fol. 625] fied in Section 7 of this Article, a qualified librarian, whose principal activities are devoted to the development and maintenance of an effective library service.

Commencing September 1, 1932, for additions to the library in the way of continuations and otherwise, there shall be spent over any period of five years at least ten thousand dollars, of which at least fifteen hundred dollars shall be expended each year. Commencing September 1, 1939, such library shall include substantially the following:

1. The published reports of appellate decisions of the state in which the school is located, together with commonly used editions of the statutes and digests.

2. The published reports prior to the Reporter System of decisions of the courts of last resort in at least one-half the states of the United States with reasonably up-to-date editions of statutes in one-fourth the states.

3. The published reports of the decisions of the United States Supreme Court with the generally used editions of federal statutes and digests.

4. The National Reporter System complete.

5. Leading up-to-date publications in the way of general digests, encyclopedias, and treatises of accepted worth.

6. At least ten legal periodicals of recognized worth, com-
[fol. 626] plete with current numbers.

7. The English reports covered by the so-called reprint, together with the law reports to date.

(Amended 1924, see Proceedings, 1924, pp. 50, 51; 1925, see Proceedings, 1925, pp. 85-87; 1930, see Proceedings. 1930, pp. 23, 25; 1937, see Proceedings, 1937, pp. 38-44.

The 1927 recommendations of the Executive Committee, as to content of the library, were incorporated in the Articles at the 1937 Meeting, with two changes, (1) decreasing the number of statutory editions required from those of one-half to those of one-fourth the states, and (2) increasing the number of legal periodicals from six to ten. (See Proceedings, 1927, p. 7, 1937; pp. 38-44.)

7. Commencing September 1, 1932, its faculty shall consist of at least four instructors who devote substantially all of their time to the work of the school; and in no case shall the

number of such full-time instructors be fewer than one for each one hundred students or major fraction thereof.

(Adopted December 29, 1916. See Proceedings, 1916, pp. 67-80. Amended in 1924, see Proceedings, 1924, pp. 51-64 and in 1930, see Proceedings, 1930, pp. 24, 25.)

At the Thirty-Third Annual Meeting the Executive Committee made the following recommendations which *was* adopted:

[fol. 627] "Resolved, That the first clause of Article Sixth, Section 7, applies in substance though not in letter to summer sessions where any credit is given to any student toward his law degree. Resolved further, that a faculty for any such summer session may comply substantially with the said clause although containing fewer than four full-time instructors, provided that no instructor is responsible for more courses, more hours of teaching per week, or more students than is the normal standard in the particular school, and that no larger percentage of part-time instruction is given than in the balance of the school year."

(See Proceedings 1935, p. 17-18.)

8. Each member shall maintain a complete individual record of each student, which shall make readily accessible the following data: Credentials for admission; the action of the administrative officer passing thereon; date of admission; date of graduation or final dismissal from school; date of beginning and ending of each period of attendance, if the student has not been in continuous residence throughout the whole period of study; courses which he has taken, the grades therein, if any, and the credit value thereof, and courses for which he is registered; and a record of all special action of the faculty or administrative officers.

(Adopted December 31, 1919. See Proceedings, 1919, [fol. 628] pp. 87, 88.)

9. It shall be a school which possesses reasonably adequate facilities and which is conducted in accordance with those standards and practices generally recognized by member schools as essential to the maintenance of a sound educational policy.

(Adopted December 29, 1930. See Proceedings, 1930, pp. 24, 25.)

Seventh: Any school which shall fail to maintain the requirements provided for in Article Sixth, or such stand-

ard as may hereafter be adopted by resolution of the Association, shall be excluded from the Association by a vote at the general meeting, but may be reinstated at a subsequent meeting on proof that it is then bona fide fulfilling such requirement.

Any member school which shall fail to be represented by some member of its faculty at the annual meeting at least once in any three-year period shall be deemed to have discontinued its membership.

(Amended 1925. See Proceedings, 1925, pp. 17-19.)

Eighth. The officers of this Association shall be a President, a President-Elect, and a Secretary-Treasurer. The President-Elect and the Secretary-Treasurer shall be chosen [fol. 629] from among the delegates at each annual meeting. The President-Elect, upon the election of his successor, shall become the President and shall serve as such until the next election of a President-Elect. The Secretary-Treasurer shall hold office until his successor is elected. Provided, however, that, in event of the death or resignation of the President at any time during his term of office, the President-Elect shall immediately become the President, and shall serve as such until the second election of a President-Elect thereafter; and, in event of the death or resignation of the Secretary-Treasurer at any time during his term of office, the Executive Committee shall have the power and it shall be its duty without unnecessary delay, to appoint from among the teachers in the member schools a Secretary-Treasurer, who shall hold office as such until his successor is elected. At the annual meeting in 1937, in addition to the election of a President-Elect and a Secretary-Treasurer, a President shall be chosen from among the delegates and shall hold office until the next election of a President-Elect. The President-Elect shall have power to appoint committees and (in cases where the delegates at round table conferences do not elect councils) round table councils, to serve during his presidency; and he shall have no other power except that attaching to a member of the Executive Committee.

(Amended 1937, see Proceedings, 1937, pp. 45-51.)

[fol. 630] Ninth. At each annual meeting there shall be chosen from among the delegates two (or, if the Secretary-Treasurer is chosen also as the President-Elect, three) per-

sons to be members of the Executive Committee, who with the President, the President-Elect and the Secretary-Treasurer shall form such Committee. The Secretary of the Association shall be Secretary of the Committee.

(Amended 1937, see Proceedings, 1937, pp. 45-51.)

Tenth: The Executive Committee shall have charge of the affairs of the Association and is especially intrusted with seeing that the requirements of Articles Sixth and Seventh are complied with. All complaints shall be addressed to the Executive Committee, and shall be filed at least ninety days before the annual meeting of the Association. The Committee shall investigate all complaints and report its findings, with such recommendations as it shall think proper, to the Association for its action and shall make a report at the annual meeting. This provision shall not, however, prevent any matter being taken up and passed upon by the Association, except that no Law School shall be excluded from the Association under the Seventh Article unless the Executive Committee has given it thirty days' notice that it has in the opinion of that Committee failed to comply with the provisions of the Sixth and Seventh Article. When the Executive Committee has as- [fol. 631] certained that a member school has failed to maintain the requirements provided for in Article Sixth, or such standards as may be hereafter adopted by the Association, it may by a unanimous vote suspend such school from membership until the Association shall decide at the next general meeting whether the school shall be reinstated or definitely excluded.

(Amended 1935, see Proceedings, 1935, pp. 14-17.)

For discussion of the powers and duties of the Executive Committee under this section see Proceedings, 1906, pp. 114-129.

As to power of Executive Committee to pay expenses of committees, see Proceedings, 1921, pp. 136, 137.

Eleventh. Applications for membership shall be addressed to the Secretary, accompanied by evidence that the school applying has, for at least two years immediately preceding complied with the requirements as set forth in Articles Sixth and Seventh. The Executive Committee shall examine the application and report to the Association whether the applicant has fulfilled the requirements. Appli-

cations for membership shall be made at least sixty days before the meeting of the Association.

(Amended 1923, see Proceedings, 1923, p. 49; and 1925, see Proceedings, 1925, pp. 6-11.)

Twelfth. The Executive Committee may conduct its busi-
[fol. 632] ness by correspondence.

Thirteenth. The officers may be re-elected and a retiring officer may be elected a member of the Executive Committee, but no person shall serve as an elected member of the Executive Committee in successive years, no school shall have an elected member of the Executive Committee in successive years, and no school shall have more than one member on the Executive Committee in any year. The term "elected member" in this Article does not include the President, the President-Elect or the Secretary-Treasurer.

(Amended 1936, see Proceedings, 1936, pp. 31-36. Amended, 1937, see Proceedings, 1937, pp. 45-51.)

Fourteenth. The annual assessment on each school shall be sixty-five dollars, payable in advance, and any school which shall have failed to pay its assessments during the year shall be dropped from the Association but may be reinstated by vote of the Association upon payment of arrears.

Recommendation of the Executive Committee, April 18, 1915: "The committee voted to recommend that Article Fourteenth of the Articles of Association be amended by substituting the word 'twenty-five' for the word 'ten' so that it will read: 'Fourteenth. The annual assessment on each school shall be twenty-five dollars, payable in advance,' etc." This recommendation was modified at the December, [fol. 633] 1915, meeting, by making the annual assessment twenty dollars. See Proceedings, 1915, p. 53. At the December, 1920, meeting, the annual assessment was fixed at thirty dollars. See Proceedings, 1920, p. 133. At the twentieth annual meeting 1922, the annual assessment was fixed at forty dollars. See Proceedings, 1922, p. 54. At the December, 1930 meeting, the annual assessment was fixed at sixty-five dollars. See Proceedings, 1940, p. 20.

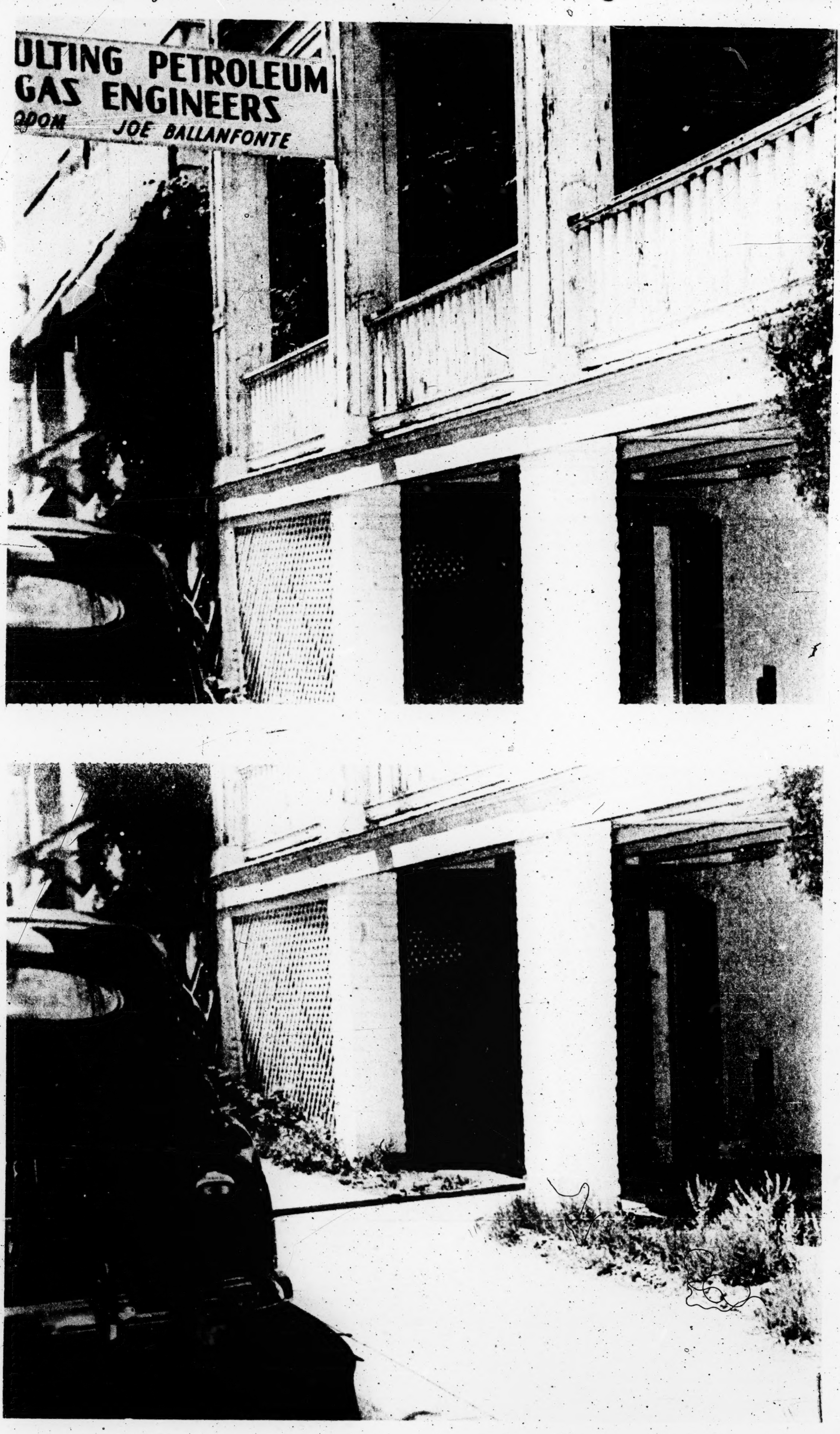
A recommendation of the Executive Committee on September 28, 1931, that "the annual assessment on each school shall be one hundred dollars ($100), payable in advance, and any school which shall have failed to pay its assessment during the year shall be dropped from the Association, but

may be reinstated by vote of the Association upon payment of arrears. The round-trip railway fare of one delegate from each school to the annual meeting shall be paid from the treasury of the Association, but such payment shall not be made for travel beyond the United States or in the Dominion of Canada, or where no delegate has been in attendance'' was lost, on a vote on December 29, 1931, at the nineteenth annual meeting. (See Proceedings, 1931, pp. 31, 55-77.)

Fifteenth. These articles may be changed at any annual meeting, the vote on such change shall be by schools, and no change shall be adopted unless it is voted for by two-[fol. 634] thirds of the schools represented, nor unless it is voted for by at least one-third of all the members of the Association; provided, that no motion for an amendment shall be considered unless a copy of such proposed amendment be filed with the Secretary at least sixty days before the meeting and a copy thereof sent forthwith by the Secretary to each member. (As amended 1923. See Proceedings, p. 49.)

''Two-thirds of the schools represented'' was held to mean, represented in the vote on the question before the convention. (Proceedings, 1922, pp. 96-98.)

RELATOR'S EXHIBIT NO. 2



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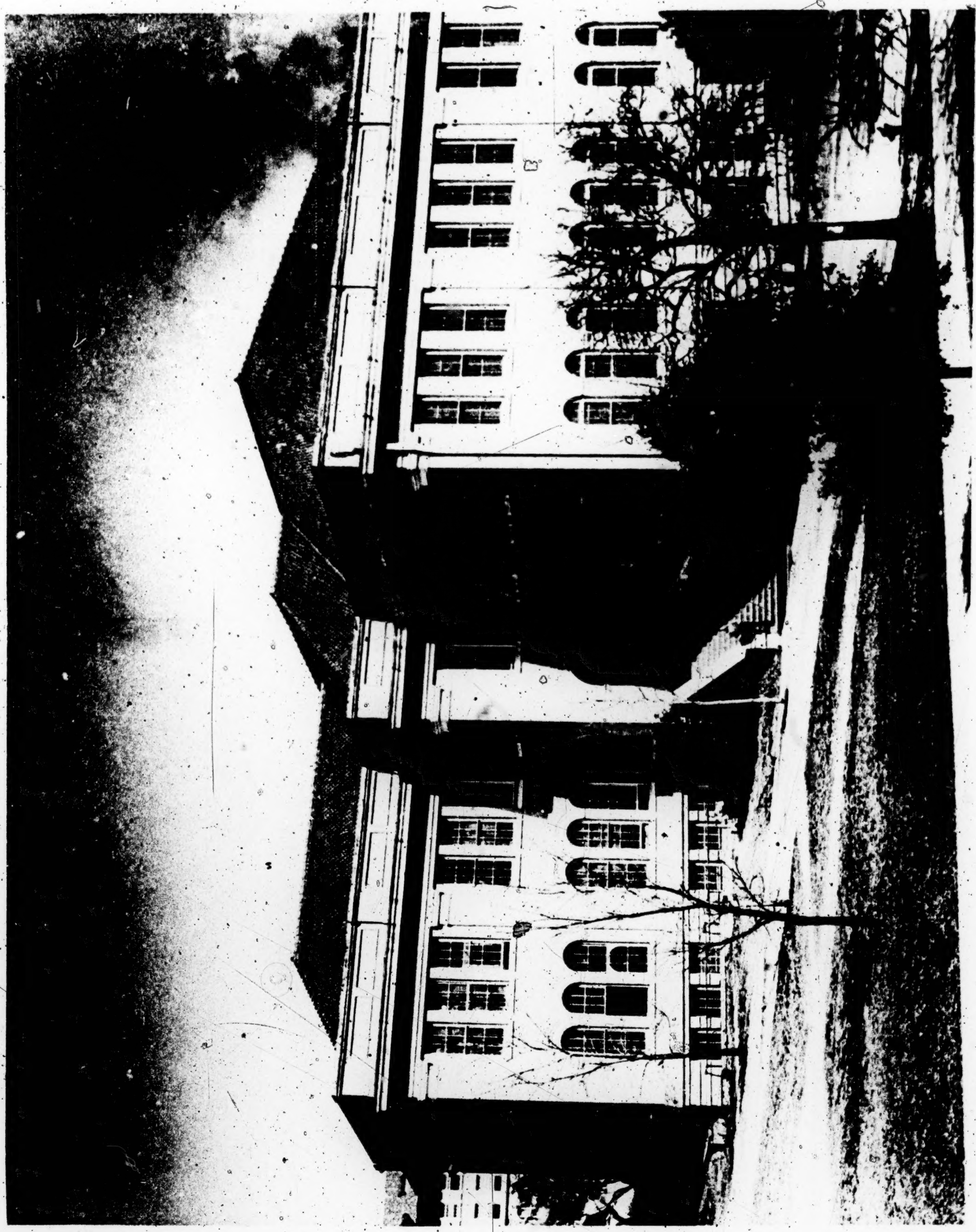
RELATOR'S EXHIBIT NO. 4



THE SCHOOL OF LAW of
THE TEXAS STATE UNIVERSITY FOR NEGROES
Box E, University Station
Austin 12, Texas

Return Receipt Requested
FEE PAID

REGISTERED
NO. ~~121451~~
12158

Mr. Heman Marion Sweatt
3402 Delano Street
Houston, Texas

RELATOR'S EXHIBIT NO. 5

RELATOR'S EXHIBIT NO. 6

[fol. 640] RELATOR'S EXHIBIT No. 8

Scholarship Aid Fund

For Texas Negro Graduate and Professional Students

1945-1946

Due to inadequate funds the following figures are based on tuition and travel grants which were insufficient to cover actual costs. For example, the tuition charged at Teachers College Columbia University for 15 points of work is $470.00 per long session; roundtrip travel is $96.00. This, less the tuition charged at Prairie View University and less roundtrip travel from applicant's home to Prairie View University, makes the differential $508.44. However, the amount of the grant allowed is $235.00—$165.00 tuition for both semesters and $70.00 roundtrip travel, leaving $273.44 to be paid by the applicant.

Regular Appropriation 1945-1946:

Long Session Grants	$14,843.66
Summer Session Grants	9,559.51
Secretarial Salary	480.25
Supplies	116.58
Total	$25,000.00

Deficiency Appropriation 1945-1946:

Warrants issued on August 2, 1946	$5,749.75	
Warrants issued on August 29, 1946	779.71	
Warrants to be issued	590.68	
Total as of October 9, 1946		7,120.14
Total for the Year 1945-1946		$32,120.14*

* The Deficiency Appropriation was made on July 26th, 1946 when it was too late for a large number of applicants to attend school. Had the Deficiency Appropriation been made earlier, more than $40,000.00 would have been required for the year 1945-1946.

[fol. 640a] Financial Statement as of May 1, 1946

Scholarship Aid Fund

1945-1946

Scholarship Aid Fund	$25,000.00
Amounts Encumbered as of May 1st, 1946	
Long Session Grants (1945-1946)	$14,717.10
Postage, Supplies and Secretarial Salary (approx.)	534.17
Total Amount Encumbered	15,251.27
Balance on hand	9,748.73*

* It should be noted that the balance on hand as of January 31, 1947 is only $8,915.33 indicating that there will be a greater deficit this year.

Actual and Approximate Amounts Needed for Summer Session

Old Applications completed (actual)	$13,255.51	
New Applications completed (actual)	4,590.68	
Incomplete Applications (New & Old Appr.)	6,752.02	
Total needed for summer, 1946	$24,598.21	
Total amount on hand	9,748.73	
Deficit		$14,849.48

[fol. 640b] Statistics Concerning Applications for Texas Scholarship Aid

1945-46

Applications Received	
Long Session	108
Summer Session	360
Total Applications 1945-1946 School Year	468

Committee Action

Applications Approved:

Long Session	93
Summer Session	231
Total applications approved	324*

* Of this number 65 withdrew their applications or failed to attend because grants could not be assured.

Applications Disapproved

(Work available at Prairie View	20
Incomplete applications	124

[fol. 640c] Schools Attended by Texas Scholarship Aid Recipients

1945-1946

	Long Session	Summer Session
Atlanta University	9	11
Boston University	2	4
University of California	1	3
University of Southern California	2	19
Catholic University of America	1	1
Chicago Musical College	0	1
Chicago School of Art	0	1
Chicago University	2	12
Colorado A. & M. College	1	0
Colorado State College	0	9
Colorado University	1	14
Columbia University	7	30
Cornell University	0	3
University of Denver	0	4
University of Detroit	1	0
Fisk University	0	1
Margaret Hague Maternity Hospital	0	1
Howard University	12	0
Indiana State Teachers College	0	1
Indiana University	1	1
Iowa State College	2	3
Iowa State University	4	6

1945-1946

	Long Session	Summer Session
Kansas State College	2	4
Loyola University	1	0
Meharry Medical College	18	0
University of Michigan	5	30
Michigan State College	1	0
New England Conservatory	1	0
University of New Mexico	0	1
New York University	2	1
Northwestern University	0	9
Ohio State College	0	3
University of Pennsylvania	0	3
University of Pittsburgh	0	1
Robert H. Terrell Law School	1	0
Tuskegee Institute	3	0
Washington University	0	1
Wayne University	1	2
Western Reserve	0	1
University of Wisconsin	1	6
Xavier University	0	1
Total	82	188

[fol. 640d] Subjects Taken by Texas Scholarship Aid Recipients

1945-1946

	Long Session	Summer Session
1, Art (Including Fine Arts)	0	2
2. Business Administration	2	0
3. Education		
(1) Admin. & Supervision	3	22
(2) Education	0	26
(3) Educational Guidance	0	19
(4) Educational Psychology	1	1
(5) Health & Physical Education	3	11
(6) Rural Education	0	3
4. Languages		
(1) English	2	9
(2) French	1	0
(3) Spanish	1	3

1945-1946

	Long Session	Summer Session
5. Library Science	3	7
6. Mathematics	1	5
7. Music	3	11
8. Professions		
(1) Dentistry	12	0
(2) Dental Surgery	1	0
(3) Dental Technology	2	0
(4) Engineering (Mechanical)	1	0
(5) Law	3	0
(6) Medicine	13	0
(7) Medical Techinology	1	0
(8) Pharmacy	2	1
(9) Veterinary Medicine	5	0
9. Sciences		
(1) Chemistry	1	3
(2) Physiology	1	1
(3) Natural Science	0	1
10. Social Science		
(1) Economics	1	1
(2) History	0	7
(3) Psychology	1	1
(4) Social Science	0	1
(5) Social Service	0	1
(6) Social Work	9	14
(7) Sociology	2	1
(8) Public Health	0	7
11. Speech	0	4
12. Vocations		
(1) Agriculture	1	9
(2) Home Economics & Child Care	6	16
(3) Trade & Industries	0	1
Total	82	188

[fol. 640e] Financial Statement as of January 31, 1947

Scholarship Aid Fund

1946-1947

Amounts Encumbered as of January 31, 1947		
Scholarship Aid Fund—1946-1947		$25,000.00
Long Session Grants	$18,223.37	
Withdrawals	2,429.85	
	$15,793.52	
Secretarial Salary	227.50	
Supplies	63.65	
Amount encumbered as of January 31, 1947		16,084.67
Balance on hand		$8,915.33

[fol. 641] RELATOR'S EXHIBIT No. 9

Office of Executive Secretary

TEXAS SCHOLARSHIP AID COMMITTEE

STATE DEPARTMENT OF EDUCATION

Austin, Texas

Statement of Policy and Procedure

Adopted by the Committee on Scholarship Aid for Negro Residents of Texas Attending Graduate and Professional Schools Outside the State)

I. To be eligible for scholarship aid:

1. The applicant must be a resident of Texas and must have resided in Texas for eight years or more.

2. If desiring to do graduate study, the applicant must hold a Bachelor's degree from an institution approved by the Southern Association of Colleges and Secondary Schools, or by an equivalent agency.

3. If desiring to do professional study, the applicant must clearly meet the requirements for admission to such professional school work. If selection is necessary, preference will be given to college graduates. There are few

fields of study that can be considered "professional" that do not require some college work in preparation.

4. The applicant must file an application on blank supplied by the Committee, and must file with it, or have sent to the Executive Secretary complete transcripts of all college or university work done, together with three testimonials and a letter stating the purpose of the study; and must complete the questionnaire form giving full details.

5. No grant will be made to applicants who plan to work for the Master's degree in fields in which such work, of approved quality and standard, is provided at Prairie View University.

6. Each applicant is required to submit, as a part of his application, a letter from the Dean of the Graduate School certifying that he is eligible for admission to Graduate School with not more than eight semester hours of undergraduate work to be made up.

7. To be eligible for a renewal grant, the student must write a letter requesting consideration for the grant and must be certain that a transcript of the last work done by him under the last grant of the Committee has been sent to the office of the Executive Secretary. For a renewal grant the student is not required to file a complete new application, but only the letter, supplementary transcript, and questionnaire form referred to above.

8. Students who are eligible to receive G. I. Scholarship Aid or Rehabilitation Aid may not receive State Scholarship Aid during the period of eligibility for G. I. Scholarship Aid or Rehabilitation Aid.

II. The Grants:

1. Each grant will be planned to compensate the student for the increased costs of tuition and travel necessary to secure graduate or professional instruction, not provided by a publicly supported institution for Negroes in Texas, in an out-of-State school.

2. In determining the amount of the grant, the Committee will include the following:

a. Actual tuition charged the student by the out-of-State institution, but not to exceed $100 for a semester (except that in approved medical institutions the tui-

tion may be $150 for the semester), less in each case $25 per semester, the tuition charged residents in State supported Texas institutions.

b. For the Long Session the cost of one round trip, at 3¢ per mile, by the shortest rail route from the student's home to the location of the approved institution, less the round trip cost at the same rate from the student's home to Prairie View University will be provided.

c. The amount of travel grant to be allowed Summer School students will be determined by the length of time to be devoted to study.

d. An addition of not to exceed 10 per cent of the allowance made on the foregoing bases, to cover incidental increased expense.

(Each applicant should note that the grants cannot take into account other phases of expense than those mentioned.)

3. All grants will be paid to the recipients in the following manner:

a. A State warrant payable to the student, in an amount determined by one-half the travel plus the tuition for the first semester or term (each as allowed for in the grant) with a proportionate addition as provided in 2-d above, will be forwarded to the chief financial officer of the institution approved for the student, to be delivered to the student on completion of registration.

b. In the same way, warrants similarly covering the allowance for tuition for the subsequent semesters or terms will be forwarded to the financial officer of the institution just prior to the tuition payment periods.

[fol. 641a] c. A final warrant covering the return travel cost will be sent to the financial officer for delivery to the student just prior to the close of the session or other approved period of study.

(Those who receive grants should note that no part of the grant can be made available to them until they have reached the institution and completed registration.)

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III.

1. Students who receive grants from this Committee will be required to carry a normal schedule as students. They may accept any scholarship or employment from the institution they attend, to which their merit may entitle them, without reduction of the grant, provided the duties incident to such scholarship or employment do not prevent registration for and satisfactory completion of a normal schedule of work.

2. Any grant made by this Committee will be terminated after any report period in which it appears that the student is not succeeding in his studies.

[fol. 642] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 643] AGREEMENT OF COUNSEL

We hereby agree that the foregoing pages numbered 1-641, inclusive, (noting that through typist's error pages 357-366 were skipped in numbering), constitute a full, true and correct transcript of all of the testimony in Question and Answer Form admitted in evidence by the Court upon the trial of Cause No. 74,945, styled Heman Marion Sweatt, Relator, vs. Theophilus Shickel Painter, et al, Respondents, in the 126th Judicial District Court of Travis County, Texas.

We further agree as to the documentary evidence admitted on the trial that this Volume I of the Statement of Facts, numbered pages 1-641, inclusive, also contains copies of Respondents' Exhibits Numbers 1, 2, 3, 7, 13, and copy of Relator's Exhibit No. 1; and also contains either original or photostatic copies of Respondents' Exhibits Numbers 6 and 14, and original or photostatic copies of Relator's Exhibits Numbers 2, 3, 4, 5, 6, 8 and 9.

We further agree that in Volume II of this Statement of Facts and accompanying same and being a part hereof, are contained original or photostatic copies of Respondents' Exhibits Numbers 4, 5, 6, 8, 9, 10, 11, 12, 15 and 16, and of Relator's Exhibit No. 7; and that Exhibits A, B, C, D, E, F, G, H, I, J, in original form accompany this Statement of Facts not bound in Volume I or II, and are a part hereof.

We further agree that this Volume I of the Statement of Facts contains all objections to the admission or exclusion of testimony, the rulings of the Court thereon, and the [fols. 644-647] exceptions reserved thereto.

And we further agree that this record shall be filed as the Statement of Facts and Bills of Exception (except such other and further Bills of Exception as may be filed separately) in this cause.

Dated this 7 day of July, A.D. 1947.

Price Daniel, Attorney General of Texas, Jackson Littleton, Assistant Attorney General of Texas, Joe R. Greenhill, Assistant Attorney General of Texas, Counsel for Respondents; W. J. Durham, Thurgood Marshall, James M. Nabrit, Jr., E. B. Bunkley, Jr., Counsel for Relator.

[fol. 648] CAPTION

THE STATE OF TEXAS,
County of Travis:

At a term of the 126th Judicial District Court of Travis County, Texas, begun and holden at Austin on the 17th day of March, A. D. 1947, before the Hon. Roy C. Archer, Judge thereof presiding, and which said term of Court, by order duly entered on the 14th day of June, 1947, was extended until and including the 1st day of July, 1947, and which said term, as so extended, was by order duly entered on said date, finally adjourned, the following numbered and entitled suit came on for trial, to-wit:

No. 74,945

HEMAN MARION SWEATT

vs.

THEOPHILUS SHICKEL PAINTER, et al.

[fol. 649] IN DISTRICT COURT OF TRAVIS COUNTY

APPLICATION FOR TRANSCRIPT—Filed May 29, 1947

Law Offices

W. J. Durham, 2419 San Jacinto Street, P. O. Box 641, Dallas 1, Texas

W. J. Durham, Phone: Central 5236, District Clerk, Austin, Texas; C. B. Bunkley, Jr., Phone: Riverside 1011.

May 27, 1947.

#74945

In Re: HEMAN MARION SWEATT, vs. PAINTER, et al.

DEAR SIR:

Will you please prepare transcript in the above case and include therein the following pleadings:

1. Relator's Original Application or Petition for Writ of Mandamus.

2. Relator's Second Supplemental Petition.

3. Relator's Third Supplemental Petition.

4. Respondents' First Amended Answer.

[fol. 649a] 5. Respondents' First Supplemental Answer.

6. Respondents' Suggestion of Want of Parties.

7. Respondents' Motion to Strike Stipulated Facts.

8. Stipulation of Facts.

9. Relator's Answer to Respondents' Motion to strike Stipulated Facts.

10. Judgment of the Court.

11. Appeal Bond.

12. Certificate of Cost and etc.

This notice is given under and by virtue of Rule 376 of the Texas Rules of Civil Procedure.

We ask that the same be prepared under your hand and seal of the Court for transmission to the Court of Civil

Appeals for the Third Supreme Judicial District of Texas, sitting at Austin.

I am respectfully yours, W. J. Durham

This is to certify that I have this day mailed to the Honorable Price Daniels, Attorney General for the State of Texas and the Attorney of Record for Respondents at Austin, Texas a true copy of the Precipe.

W. J. Durham.

[File endorsement omitted.]

[fol. 650] IN DISTRICT COURT OF TRAVIS COUNTY

REQUEST FOR ADDITIONAL INSTRUMENTS TO BE INCLUDED IN THE TRANSCRIPT—Filed June 18, 1947

Office of the Attorney General, Austin, Texas

June 17, 1947.

The District Clerk, Travis County, Austin, Texas.

No. 74945

In re: Sweatt v. Painter, et al.

DEAR SIR:

Please include the following in the transcript in the above styled cause:

1. Judgment of June 26, 1946.

2. State's Motion, filed December 17, 1946, showing availability of Law School.

3. Judgment of December 17, 1946.

4. Orders (Mandate) of the Court of Civil Appeals.

(a) granting permission to substitute parties.

(b) setting aside trial court's judgment and remanding the cause for further proceedings.

5. Order concerning fact stipulations, dated on or about June 17, 1947.

Yours very truly, Price Daniel, Attorney General of Texas, by Joe R. Greenhill, Executive Assistant.

[fol. 651] [File endorsement omitted.]

[fol. 652] IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

No. 74,945

HEMAN MARION SWEATT

vs.

THEOPHILUS SHICKEL PAINTER, CHARLES TILFORD McCORMICK, Edward Jackson Matthews, Board of Regents; Dudley K. Woodward, Jr., Orville Bullington, E. E. Kirkpatrick, W. H. Scherer, W. Scott Schreiner, D. M. Strickland, C. O. Terrell, Edward B. Tucker and David M. Warren

APPLICATION FOR WRIT OF MANDAMUS—Filed May 16, 1946

To the Honorable Judge of Said Court:

Now Comes, Heman Marion Sweatt, hereinafter called Relator, who resides at 3402 Delano Street, Houston, Harris County, Texas, complaining of Theophilus Shickel Painter, Charles Tilford McCormick, and Edward Jackson Matthews, who resides in Austin, Travis County, Texas; Dudley K. Woodward, who resides in Dallas, Dallas County, Texas; Orville Bullington, who resides in Wichita Falls, Wichita County, Texas; E. E. Kirkpatrick, who resides in Brownwood, Brown County, Texas; W. H. Scherer, who resides in Houston, Harris County, Texas; W. Scott Schreiner, who resides in Kerrville, Kerr County, Texas; D. M. Strickland, who resides in Mission, Hidalgo County, Texas; C. O. Terrell, who resides in Ft. Worth, Tarrant County, Texas, Edward B. Tucker, who resides in Nacogdoches, Nacogdoches County, Texas; and David M.

Warren, who resides in Panhandle, Carson County, Texas, the Respondents, and each of them, alleges and states:

[fol. 653] 1

That relator, Heman Marion Sweatt, is a resident and citizen of the United States, and of the State of Texas, County of Harris, and City of Houston; that relator is desirous of studying law in the School of Law of the University of Texas, which is supported and maintained by the tax payers of the State of Texas, for the purpose of preparing himself to practice law in the State of Texas, and to render public service therein; that he has been arbitrarily refused admission to the School of Law of the University of Texas; that on the 26th day of February, 1946, relator duly made application for admission to the first year class of the School of Law of the University of Texas; that at the time said application for admission to the School of Law of the University of Texas was made by relator, he then possessed and still possesses all the scholastic, moral and other lawful qualifications prescribed by the Constitution and Statutes of the State of Texas, by the Board of Regents of the University of Texas, and by all duly authorized officers and agents of the said University and the School of Law, for admission into the first year class of the School of Law of the said University.

2

That the relator, Heman Marion Sweatt, was at the time of the making of the aforementioned application for admission to the School of Law, of the University of Texas, and [illegible] is ready, willing and able to pay all lawful Registration fees and other regular fees and charges required of first year students in the School of Law of the University of Texas, and conform to all lawful uniformed rules and regulations, established by lawful authority for admission to the first year class of the School of Law of the University of Texas; [fol. 654] that relator's application was arbitrarily and illegally rejected pursuant to a policy custom or usage denying qualified Negro applicants to the equal protection of the laws, solely on the ground of his race and color.

3

That the School of Law of the University of Texas is the only law school in the State, maintained by the State and under its control, and is the only law school in Texas that relator is qualified to attend. Relator desires that he be admitted in the first year class of the School of Law of the University of Texas at the next regular registration period after this cause has been heard and determined, and upon his paying the requisite uniform fees and conforming to the lawful, uniform rules and regulations for admission to such class.

4

That the respondents, Dudley K. Woodward, Orville Bullington, W. E. Kirkpatrick, W. H. Scherer, W. Scott Schreiner, D. M. Strickland, C. O. Terrell, Edward B. Tucker and David M. Warren, Board of Regents of the University of Texas, is an administrative agency of the State and excercises of students in the University, a corporation organized as a part of the educational system of the State and maintained by appropriations from the public funds of the State of Texas; the respondent, Theophilus Shickel Painter, is the duly appointed and qualified acting President of the said University and as such is subject to the authority of the Board of Regents as an immediate agent governing and controlling the several colleges and [fol. 655]schools of the said University; the respondent, Charles Tilford McCormick, is the Dean of the School of Law of the said University, whose duties comprise the government of the said law school including the admission and acceptance of applicants eligible to enroll as students therein, including your relator; the respondent, Edward Jackson Matthews, is the Registrar and Dean of Admission, whose duty is to pass on the eligibility of applicants who seek to enroll as students therein, including your relator; that admission to the School of Law is under the control of said Registrar and Dean of Admission; all respondents herein are being sued in their official capacity.

5

That the School of Law specializes in law and procedure which regulates the courts of justice and government in

Texas and there is no other law school maintained by the public funds of the State where relator can study law and procedures to the same extent and on an equal level of scholarship and intensity as in the School of Law of the University of Texas; the arbitrary and illegal refusal of respondents, Board of Regents, Theophilus Shickel Painter, Charles Tilford McCormick and Edward Jackson Matthews, to admit relator to the first year class of the said law school solely on the ground of race and color, inflicts upon your relator an irreparable injury and will place him at a distinct disadvantage at the bar of Texas and in the public service of the foresaid State with persons who have had the benefit of the unique preparation in Texas law and procedure offered to white qualified applicants in the School of Law of the University of Texas.

[fol. 656] 6

That certain requirements for admission to the first year class of the School of Law of the University of Texas have been prescribed by the Board of Regents or other administrative officials of the University of Texas; that said requirements prescribed by the aforesaid Board of Regents or other administrative officials of the University of Texas, provides as follows: Applicants for admission must be at least nineteen (19) years of age; must furnish satisfactory evidence of good moral character; said requirements further provide that an applicant holding a bachelors degree from the University of Texas or from any other acceptable institution is entitled to full admission to the School of Law of the University of Texas. Relator is over nineteen (19) years of age, has furnished Registrar and Dean of Admission proof of his good moral character, and has completed the full four (4) year college course at Wiley College, an accredited college by the Southern Association of Colleges and Secondary Schools of the Southern States and possesses a bachelors degree from the aforementioned Wiley College; that said relator has completed twelve (12) semester hours of Graduate work at the University of Michigan, Ann Arbor, Michigan, and maintained an average of B-plus or more, while attending the University of Michigan; that relator has in all particulars met the qualifications necessary for admittance to the School of Law of the University of Texas, which fact respondents

have admitted; relator is ready, willing and able to pay all lawful charges and tuition, requisite to admission to the first year class of the School of Law, and is ready, willing, and able to fulfill all other requisites for admission to the School of Law of the University of Texas.

[fol. 657]

7

On the — day of ——, 1946, relator applied for admission to the School of Law of the University of Texas and complied with all the rules and regulations entitling him to admission by filing with the proper officials of the University an official transcript of his scholastic record; said transcript was duly examined and inspected by the President, Dean of the School of Law and Registrar and Dean of Admission of the University; respondents aforementioned, and found to be an official transcript as aforesaid entitling him to admission to the School of Law of the University; relator was denied admission to the School of Law solely on the ground of race and color in violation of the Constitution and laws of the United States and of the State of Texas.

8

Respondents have established and are maintaining a policy, custom and usage of denying to qualified Negro applicants the equal protection of the laws by refusing to admit them into the law school of the University of Texas solely because of race and color and have continued the policy of refusing to admit qualified Negro applicants into the said school while at the same time admitting white applicants with less qualifications than Negro applicants solely on account of race and color.

9

That on the 16th day of March, 1946, the respondent, Theophilus Shickel Painter, refused admission to the Law School of the University of Texas to relator, although admitting that relator was duly qualified for admission to the [fol. 658] School of Law at the University of Texas, save and except for the fact that he is a Negro; that relator was denied admission to the school of law at the University

of Texas on the ground that there is a long continued policy of segregating race in educational institutions in the State of Texas; that relator was denied admission to the School of Law of the University of Texas solely because of his race and color.

10

Relator further shows that he has no speedy, adequate remedy at law and that unless a Writ of Mandamus is issued he will be denied the right and privilege of pursuing the course of instruction in the school of law as hereinabove set out.

Wherefore, Relator being otherwise remediless, prays this Honorable Court to issue a Writ of Mandamus requiring and compelling said Respondents to comply with their statutory duty in the premises and admit the relator in the School of Law of the said University of Texas and have such other and further relief as may be just and proper.

(S.) W. J. Durham, Attorneys for Relator.

Duly sworn to by Heman Marion Sweatt. Jurat omitted in printing.

[fol. 659] [File endorsement omitted.]

[fol. 660] IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

[Title omitted]

RELATOR'S SECOND SUPPLEMENTAL PETITION—Filed May 8, 1947

To the Honorable Judge of Said Court:

Comes now, Heman Marion Sweatt, Relator in the above entitled and numbered cause and files this his Second Supplemental Petition and for such second supplemental petition, he alleges as follows:

I

1. Relator specially excepts to the following portion of allegations in Respondent's First Amended Answer, begin-

ning at Line 16 with the word "And" and reading as follows:

> "And arranged for instructor's classes, library and other facilities"

for the reason that the same does not set out what arrangements were made with said instructors, what classes were arranged for, if any, what library was established, if any, [fol. 661] and what other facilities were acquired and established, if any. The same is vague and indefinite and is the conclusion of the pleader and does not inform the relator what evidence will be required to meet such defense and relator can not prepare a defense to said vague and indefinite allegation and respondent should be required to specifically plead what arrangements had been made for instructors, if any, and what courses had been established, if any, and what other facilities had been provided for, if any.

Wherefore, Relator prays that the respondent be required to specifically set out said alleged arrangement for instructors, the classes alleged to have been provided, the library alleged to have been established and what such other alleged facilities were if any.

2. Relator further specially excepts to the following portion of the respondent's First Amended Answer, beginning with the word "Relator" in line 2 of the second section of Allegation 2, which reads as follows:

> "Relator had notice of such law school and arrangement."

for the reason that respondents do not allege whether such notice was verbal or in writing, by whom such notice was sent, how such notice was sent nor the contents of such notice, and relator can not determine from said pleading what proof will be required to meet said purported allegation of fact, that is pleaded as a defense and relator is unable to prepare to meet said purported allegation of fact because said allegations is indefinite and does not give relator sufficient information to prepare by testimony to meet such alleged defense, and of this special exception [fol. 662] relator prays judgment of the Court.

3. Relator further specially excepts to the following por-

tion of respondents' first amended answer, beginning at line 7 with the word "And", section four (4) of Allegation 2, and reads as follows:

> "And adequate text and reference library was installed."

for the reason that the same is a conclusion of the pleader that the library established, if any, was an adequate library and the respondents do not allege the list of books, if any, that was installed in said alleged library. That the respondents should be required to plead specifically a list of books and periodicals, if any, installed in said library in order that relator may adequately prepare his defense to said purported allegation of fact pleaded herein as a defense and of this special exception relator prays that the Court sustain the same, and that the respondent be required to set out specifically the list of books alleged to have been installed in said reference library.

4. Relator further specially excepts to the following portion of respondents' first amended answer beginning at Line 11 with the word "For" in section 4 of allegation Two (2) which reads as follows:

> "For permanent use, approximately ten thousand carefully selected books were ordered which together with those already in the school are sufficient to satisfy the standards of the American Bar Association and the American Association of Law Schools."

[fol. 663] for the reason that said allegation that said books were sufficient to satisfy the standards of the American Bar Association and the Association of American Law Schools is a mere conclusion of the pleader and the respondents do not set out the list of books claimed to have been carefully selected, it does not say from whom said books were ordered and respondents do not allege the standards of the American Bar Association or the standards of the Association of American Law Schools (American Association of Law Schools), and the relator can not determine what standards respondents claim to have satisfied and all of said matters are alleged as a defense in this case and relator can not determine what type and character of evidence he will be required to procure to meet said alleged

defense, and of this special exception prays that the court sustain, and that the respondents be required to specifically plead the list of books claimed to have been selected, the dates said books were ordered and from whom said books were ordered together with the price thereof, and he further prays that the respondent be required to list supplies and specifically the books claimed to have already been in the school, and he specifically prays that respondents be required to set out the standards of the American Bar Association which respondents alleged they have satisfied, and the rules and standards of the Association of American Law Schools (American Association of Law School) which respondents alleged that they have satisfied in order that relator might properly prepare his defense.

II

Comes now, the relator, Heman Marion Sweatt, herein without waiving any of his foregoing special exceptions but [fol. 664] still insisting upon the same, denies each and every allegation contained in respondents' second amended answer and demands strict proof of the same.

III

And specially pleading herein, Relator respectfully shows: On December 17, 1946, judgment was entered denying the writ of Mandamus sought by Relator. Relator excepted to said judgment and perfected an appeal of this cause to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. Thereupon the respondents (as appellees) filed a motion to remand the cause without decision. The brief filed by respondents (as appellees) prayed that the Court of Civil Appeals "affirm the constitutionality of providing equal opportunities in separate schools, finding that a reasonable time therefor is allowed, and this cause be remanded to the District Court without final decision and without prejudice to either party." On March 26, 1947, the Court of Civil Appeals entered an order as follows: "the motion for substitution of appellees was granted; appellees motion to remand was dismissed; and the trial court's judgment was set aside and the cause remanded generally to the trial court, without prejudice to the rights of either party, by agreement of the parties in open court this date. The costs of appeal are assessed against appellees. On

April — 1947, respondents filed their first amended original answer.

1. The respondents' have not established any law school other than the University of Texas School of Law that satisfies and meets the requirements and standards of the Association of American Law Schools, and relator further specially pleading herein states that the University of Texas [fol. 665] School of Law is the only law school now existing in the State of Texas and operated by public funds which satisfies the requirements, standards and rules of the Association of American Law Schools, and that the University of Texas School of Law has held and now holds membership in the Association of American Law Schools and has held said membership since on or about the year 1907, and that said law school is the only law school in the State of Texas operated by public funds which holds a membership in the Association of American Law Schools.

2. Administrative officers of the public schools system of Texas including the respondents while purporting to act under the policy, custom and usage of the State of Texas of requiring separation of white and Negro students have denied Relator and other qualified Negro students educational facilities equal to those afforded white students with similar qualifications solely because of race and color. At the time relator made his application for admission to the Law School of the University of Texas and at the time of the filing of this suit there was no state supported law school except the one to which he applied. The continued refusal of Respondents to admit the Relator *of* the Law School of the University of Texas is in violation of the Fourteenth Amendment to the Constitution of the United States. Insofar as Respondents claim to be acting under authority of the Constitution and laws of the State of Texas their continued refusal to admit the Relator to the Law School of the University of Texas is none the less in direct violation of the Fourteenth Amendment to the Constitution of the United States.

3. The State of Texas acting through its administrative [fol. 666] agents including Respondents has refused to admit qualified Negro students to the University of Texas or any of the other Colleges and Universities maintained by the State of Texas except Prairie View State Normal and

Industrial College, the name of which was changed to Prairie View University in 1945 by S. B. No. 228 which stated: "There is no adequate educational facilities for the education of the Colored population of this State." Prairie View has never offered to Negroes education equal or equivalent to that offered in any of the many universities and colleges maintained by the State of Texas for the exclusive use of all qualified students other than those of the Negro race. The quantity and quality of education offered at Prairie View is not and never has been equal to that offered at any of the other state universities and colleges in Texas in physical plant, facilities, curriculum, faculty, library, accreditation, available funds or any of the other recognized standards of comparison of colleges and secondary schools. The schools authorized by Senate Bill No. 140 Ch. 29, p. 36; Sect. 1947 have not been established.

4. Action of the Respondents in continuing to refuse to admit Relator to the Law School of the University of Texas solely because of his race and color pursuant to the Constitution and laws of Texas requiring segregation of white and Negro students is in direct violation of the Fourteenth Amendment to the United States Constitution. Insofar as the Constitution and laws of Texas relied on by Respondent prohibit Relator from attending Law School of University of Texas because of his race and color such constitutional and statutory provisions of the State of Texas as [fol. 667] applied to Relator are in direct violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Relator prays herein for the same relief as prayed for in his original petition and he prays for such other and further relief in law and in equity to which he may be entitled to.

Thurgood Marshall, J. M. Nabrit and W. J. Durham, Attorneys for Relator, Heman Marion Sweatt, by (S.) W. J. Durham.

This is to certify that I have this day mailed a true and correct copy of this petition to the Honorable Price Daniels,

Attorney General of Texas and the Attorney for Respondents, whose address is Austin, Texas.

Dated this the 7th day of May, 1947.

Thurgood Marshall, J. M. Nabrit and W. J. Durham
by (S.) W. J. Durham.

[File endorsement omitted.]

[fol. 668] IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

[Title omitted]

RESPONDENTS' FIRST AMENDED ORIGINAL ANSWER—Filed May 1, 1947

To the Honorable Judge of Said Court:

Come Now, Theophilus Shickel Painter, Charles Tilford McCormick, Edward Jackson Mathews, Dudley K. Woodward, Jr., E. E. Kirkpatrick, W. Scott Schreiner, C. O. Terrell, Edward B. Tucker, David M. Warren, William E. Darden, Mrs. Margaret Batts Tobin, and James W. Rockwell, Respondents in the above entitled and numbered cause and file this their first amended original answer to Relator's complaint. Heretofore, an answer was filed by the Respondents, an interlocutory order was entered after the first hearing hereof on June 17, 1946, and in a second hearing on December 17, 1946, judgment was entered denying the writ of mandamus sought by Relator. The answer, order and judgment were related to and based upon the provisions of and actions under Senate Bill No. 228, Acts 49th Legislature, 1945, c. 308, p. 506. To said judgment [fol. 669] Relator duly excepted and perfected an appeal of this cause to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. Subsequent to said judgment and during the pendency of said appeal the 50th Legislature, Regular Session, enacted Senate Bill No. 140, Acts 1947, repealing the above cited Senate Bill No. 228, thereby changing the law and facts pertinent to the issues herein. Thereupon the Respondents (as Appellees) moved the Court of Civil Appeals to remand this cause without decision and without prejudice in order that it might be considered under the newly enacted legislation and the new facts

and material resulting therefrom. To this the Relator (as Appellant) agreed and said judgment of December 17, 1946, was set aside and the cause was remanded to this Court without prejudice to either party by mandate dated March 27, 1946. Respondents now, therefore, with leave of the Court, file this their First Amended Original Answer in lieu of their Original Answer, and would respectfully show to the Court:

I

Respondents deny each and all of the allegations contained in Relator's Original Petition, and demand strict proof of the same, and of this they put themselves upon the country.

II

For further answer herein, the Respondents would respectfully show to the Court:

1. The Constitution and laws of the State of Texas require equal protection of the law and equal educational opportuni- [fol. 670] ties for all qualified persons but provide for separate educational institutions for White and Negro students. The Respondents therefore deny that their refusal to admit Relator was arbitrarily or illegal or in violation of the Constitutions of the United States and the State of Texas, since equal opportunities were provided for Relator in another State supported law school as hereinafter shown.

2. At the time the Relator made application for admission to the Law School of the University of Texas, and at the time of the institution of this suit, there was in effect a law providing for the establishment of a course in law for the colored youths of Texas by the Board of Directors of the Agricultural and Mechanical College at the Prairie View University at Prairie View, Texas, said law being Senate Bill 228, Acts of the 49th Legislature, 1945. Said Prairie View University was originally established in the year 1876 as an industrial and mechanical college for the colored youths of Texas, and since that date had been enlarged in scope to include other subjects as need therefor arose. Pursuant to the provisions of the cited Senate Bill No. 228, the Board of Directors of the Agricultural and Mechanical College established at Houston, Texas, a law school as a branch of Prairie View University, and arranged for instructors, courses, library, and other facilities so as to offer

to negro citizens law courses substantially equivalent to those offered at the University of Texas. Such school was open for registration and instruction on February 1, 1947. Relator had notice of such law school and arrangements, but failed and refused to avail himself of the courses in law [fol. 671] then offered, and failed to present himself or communicate in any way with any of the officials for the purpose of being registered and securing the legal training allegedly desired by him.

3. On or about March 3, 1947, the 50th Legislature of Texas enacted Senate Bill No. 140, ch. 29, p. 36, Acts 1947, providing for the establishment of a university of the first class for the negroes of Texas, to be organized in two divisions; the first to be styled "The Texas State University for Negroes," to be located at Houston, Texas, and the second to be styled "The Prairie View Agricultural and Mechanical College of Texas," located at Prairie View, Texas. Section 11 of said bill authorized and required the Respondents herein to establish immediately a separate school of law for negroes at Austin, Texas, to be known as The School of Law of the Texas State University for Negroes, and therein to provide instruction in law equivalent to the instruction being offered in law at the University of Texas. The Board of Regents of the University of Texas (Respondents herein) were constituted the governing board of such law school until its transfer to the control of the Texas State University for Negroes, and there was appropriated an adequate sum in the amount of $100,000.00 to be expended by the Respondents in the establishment and operation of said law school.

4. Pursuant to said Senate Bill No. 140, Acts 50th Legislature, 1947, and particularly Section 11 thereof, the Respondents immediately established a separate law school for negroes in Austin, Texas, in a suitable building at 104 East 13th Street, adjoining the grounds of the State Capitol building and between the Capitol and the campus [fol. 672] of the University of Texas. An adequate text and reference library was installed, and the Texas State Library, including the library of the Supreme Court of Texas, located in the State Capitol directly opposite the newly created school was made available for students of said institution. For permanent use, approximately 10,000 carefully selected law books were ordered, which, together with

those already in the school, are sufficient to satisfy the standards of the American Bar Association and the American Association of Law Schools. Courses of instruction were set up identical with those offered in the University of Texas School of Law, and the identical professors of the University of Texas were assigned to instruct said courses. The Dean of the University of Texas School of Law and the Registrar were assigned to serve in the same capacities for the new school, so that with the same courses and the same faculty, the School of Law of the Texas State University for Negroes offers education in law equal to that offered by the University of Texas. The requirements for admission, fees, class work, length of semesters, standards of work, and other related features are the same as those of the School of Law of the University of Texas, the same provisions and catalog being adopted for the new school. Notice of all the foregoing was circulated by the Respondents in a bulletin and in the public press. The law school for negroes was opened for registration and instruction on March 10, 1947, when the school and all persons connected therewith were and still are ready, willing and able to give equal instruction and opportunities to students in law and procedures.

5. On or about March 3, 1947, the Relator was personally notified by letter of the establishment of said school, of [fol. 673] its immediate availability to him, of the nature of the school, that he was eligible for admission, and that his application for legal training was accepted by said school, but the Relator, as of the date hereof, has not presented himself nor communicated in any way with any of the persons in charge of said school. Relator did not make reply to the official notice from the Registrar as requested in such notice.

6. By reason of the foregoing there is now available, and there was available to the Relator on March 10, 1947, legal training and courses in law equivalent to those in the School of Law of the University of Texas, and the Relator could have commenced the study of law to the same extent and on an equal level of scholarship and intensity as in the School of Law of the University of Texas, all of which Relator declined to do. The Respondents, therefore, specifically deny the allegation that the School of Law of the University of Texas is the only State law school that the Relator

is qualified to attend, and further deny the allegation that there is no other law school maintained by public funds where the Relator can study law and procedures to the same extent and on an equal level as in the School of Law of the University of Texas.

Wherefore, premises considered, Respondents pray that the writ of mandamus sought herein be denied, and that the Respondents go hence with their costs without day.

(S.) Price Daniel, Attorney General of Texas. (S.) Jackson Littleton, Assistant Attorney General. [fol. 674] (S.) Joe Greenhill, Assistant Attorney General.

Copies of the foregoing First Amended Original Answer of the Respondents have been mailed to W. J. Durham, Attorney for the Relator, whose address is P. O. Box 641, 2419 San Jacinto Street, Dallas, Texas.

[File endorsement omitted.]

[fol. 675] IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

[Title omitted]

RESPONDENTS' FIRST SUPPLEMENTAL ANSWER—Filed May 12, 1947

To the Honorable Judge of Said Court:

Come now, Theophilus Shickel Painter, Charles Tilford McCormick, Edward Jackson Mathews, Dudley K. Woodward, Jr., E. E. Kirkpatrick, W. Scott Schreiner, C. O. Terrell, Edward B. Tucker, David M. Warren, William E. Darden, Mrs. Margaret Batts Tobin, and James W. Rockwell, Respondents in the above entitled and numbered cause, and file this their first supplemental answer, answering the Relator's second supplemental petition filed herein, and would respectfully show:

I

1. Respondents specifically except to the allegation of Relator contained in Section III, 2 of the Relator's second

supplemental petition wherein it is alleged that the Respondents have denied to Relator "and other qualified negro [fol. 676] students" educational facilities equal to those afforded white students with similar qualifications, because this suit was brought by Relator as an individual, and Relator did not assume to act as a representative of other negroes, and said allegation is therefore improperly included, and is prejudicial in a suit involving solely the individual rights of the Relator, and Respondents say that said allegation, if true, (which is not admitted but denied) should have no bearing on the Relator's individual rights.

Wherefore, Respondents pray that the Court sustain this exception, and that the Relator be required to omit or strike the allegation as to other negroes, and the policy of the Respondents toward them.

2. Respondents specifically except to allegation III, 3, of the Relator's Second Supplemental Petition wherein it is alleged as follows: "The quantity and quality of education offered at Prairie View is not and never has been equal to that offered at any of the other state universities and colleges in Texas in physical plant, facilities, curriculum, faculty, library accreditation, available funds or any of the other recognized standards of comparison of colleges and secondary schools." and Respondents say that said allegation is not germane to the issues of this cause, is general, vague and indefinite, and is prejudicial to the Respondents in a determination of the issues drawn by the pleadings, and Respondents say that said allegation, if true, (which is not admitted but denied) should have no bearing in the determination of this suit involving solely the individual rights of the Relator.

Wherefore, Respondents pray that the Court sustain this [fol. 677] exception, and that the Relator be required to omit or strike said allegation from said second supplemental petition.

II

Further answering the Second Supplemental Petition of the Relator, the Respondents herein would respectfully show:

1. Respondents specifically deny the allegation contained in Paragraph III, 2, of the Relator's Second Supplemental Petition wherein it is alleged that it has been the policy,

custom and usage of the Respondents to require separation of the white and negro students, and have denied to Relator and other qualified negro students educational facilities equal to those offered to white students, and Respondents say that the Respondents denial of admission to the Law School of the University of Texas to Relator does not constitute a policy or custom, and further say that the Relator's application for admission to the University of Texas Law School is the first such application ever to have been made, and that the Respondents have not denied to "other qualified negro students" admission to the Law School of the University of Texas, since no such negro students have applied for admission thereto.

2. Respondents specifically deny those allegations contained in Paragraph III, 2 and 4, of Relator's Second Supplemental Petition, wherein it is alleged that the Respondents denial to the Relator admission to the Law School of the University of Texas, violated the 14th Amendment of the Constitution of the United States, and Respondents show that such amendment does not require that educational facilities be provided for white and negro students in the same school; that when a demand by a negro student [fol. 678] for a particular cou-se or facility is made for the first time, the State has the constitutional right to provide within a reasonable time separate courses or facilities, and Respondents further show, as previously alleged, that separate courses and facilities have been provided for Relator, and that such provision does not constitute any violation of the 14th Amendment of the Constitution of the United States.

Wherefore, Respondents pray that the writ of mandamus sought herein be denied, and that Respondents go hence with their costs without day.

(S.) Price Daniel, Attorney General of Texas; Jackson Littleton, Assistant Attorney General; Joe R. Greenhill, Assistant Attorney General, Attorneys for Respondents.

[File endorsement omitted.]

[fol. 679] IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

[Title omitted]

RELATOR'S THIRD SUPPLEMENTAL PETITION—Filed May 12, 1947

To the Honorable Judge of Said Court:

Come, now, Heman Mation Sweatt, Relator herein and with leave of the court first obtained files this his third supplemental petition and for such supplemental petition herein alleges;

I

Relator specially excepts to the following portions of allegation 2 section 2 of respondent's first supplemental answer which reads as follows: "that separate courses and facilities have been provided for relator," for the reason that said allegation or said statement in said allegation read and considered in connection with all other alleged matters of fact set out therein does not inform relator as to the courses alleged to have been provided, and it does not inform the relator what facilities were provided if any and it does not inform this relator when and where said courses and facilities are alleged to have been provided and this relator cannot determine from said allegation and from any other portion of said supplemental answer [fol. 680] what said alleged courses were, and what said alleged facilities were, where said alleged facilities and courses were provided and when said alleged courses and facilities were provided and this relator is unable to determine from said allegation what evidence will be required to meet said vague and indefinite allegation and of this special exception relator prays that respondents be required to plead specifically the alleged courses provided and the alleged facilities provided and the time and place where said alleged facilities and courses were provided if any.

II

Comes now, the relator, Heman Marion Sweatt, herein, without waiving any of his foregoing special exceptions but still insisting upon the same and denies each and every

allegation contained in respondents first supplemental amended original answer and demands proof of same.

And specially pleading herein, relator respectfully shows: that the respondents have pleaded the statutes and laws of Texas; and have alleged that these statutes and laws require separation of white and negro students; and respondents have further alleged that these statutes and laws require educational facilities for negroes equal to those provided for whites. In so far as respondents rely on these statutes and laws as a basis for a denial of relator's application for admission to the University of Texas School of Law, these statutes and laws and this action of respondents are the policy, custom and usage of respondents.

And further specially pleading herein relator respectfully shows that, he was compelled to go out of the State of Texas, to-wit, in 1937, to the University of Michigan [fol. 681] for the purpose of doing graduate study in Medical Bacteriology and Imm-nology, and Preventative Medicine which are offered to white students at the University of Texas but which were not offered at Prairie View University, the only school of higher learning for negroes in Texas, supported by public funds.

And relator further alleges that Prairie View University did not in 1937 offer equal educational facilities to him which were available to whites at that time at the University of Texas and other state supported schools in Texas, nor, does it now offer equal educational facilities to him which are now available to whites at the University of Texas and other state supported schools for whites in Texas.

Wherefore, relator prays for the same relief contained in his prayer in his original petition and he prays for such other relief special and general in law and in equity to which he may be entitled.

W. J. Durham, Attorney for Relator, Heman Marion Sweatt.

[fol. 682] In the 126th District Court, Travis County, Texas

[Title omitted]

Suggestion—Want of Parties—Filed June 17, 1946

Come now the respondents in the above styled and numbered cause, and make known to the court that this court

can not proceed to trial and final judgment in this case for the want of an indispensable party—that is to say, the State of Texas as a respondent in this case, in that the suit while nominally against the respondents herein is in substance and legal effect a suit against the State of Texas for this: That the Board of Regents of the University of Texas constitutes and is a governmental agency of the State of Texas, the property of every character and description, and every incidental right therein, while legally vested in the Board of Regents, nevertheless is in law the property of the State of Texas, and any relief whatever that might possibly be granted to relator herein against the respondents now before the court would in reality in essence and in law be against the State of Texas, with respect to a governmental function by it, and as such can not be lawfully rendered by this court in the absence of the State of Texas, not now a party, and no permission to relator to institute and maintain this suit against the State has been given in any manner whatsoever.

[fol. 683] In this connection the respondents would show that the matter here suggested is not a defense that could in any event be waived by these respondents, or by the Attorney General representing them, and no intention of these respondents, nor of the Attorney General representing them, has been evidenced, nor could be evidenced by failure to plead the matter of want of parties here set forth in the formal pleadings, it being sufficient that such matter be called to the court's attention.

Respondents respectfully submit that this cause should, therefore, be dismissed and stricken from the docket of this court, in support of which they call the court's attention to the following authorities:

League v. DeYoung, 2 Tex. 497;
San Antonion Independent School District v. State Board of Education, 108 S. W. (2) 445;
McKamey v. Aiken, 118 S. W. (2) 482;
Railroad Commission v. Dyer, 144 S. W. (2) 375;
Texas Prison Board v. Cabeen, 159 S. W. (2) 523;
Bryan v. Texas State Board of Education, 163 S. W. (2) 837;
Walsh v. University of Texas, 169 S. W. (2) 993;
Sherman v. Cage, 279 S. W. 508;

State Banking Board v. Winters State Bank, 13 S. W. (2) 391;
Parr v. Dunlap, 26 S. W. (2) 1082;
State Highway Com. v. Tengg, 57 S. W. (2) 929;
Mosheim v. Rollins, 79 S. W. (2) 672;
Watson v. Dodge (Ark.) 63 S. W. (2) 393;
California Securities Co. v. State (Cal.) 295 Pac. 583;
[fol. 684] Ramsey v. Hamilton (Ga.) 182 S. E. 392;
Wetz v. Potter (Okla.) 28 P. (2) 562;
State v. John's (Wash.) 15 P. (2) 693;
Sullivan v. Board of Regents (Wis.) 244 N. W. 242.
Am. Jur., Vol. 45 ss. 92-94.

Respectfully submitted. Grover Sellers, Attorney General of Texas; by (S.) Carlos Ashley, First Assistant Attorney General, by (S.) W. V. Geppert, by (S.) Jackson Littleton, Assistant Attorneys General, Attorneys for Respondents.

[File endorsement omitted.]

[fol. 685] IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

[Title omitted]

JUDGMENT OF THE COURT—Filed June 26, 1946

On this the 17th day of June, 1946, came on for hearing the petition of the relator, Heman Marion Sweatt, for Writ of Mandamus against the Respondents, Theophilus Shickel Painter, et al., and all parties appeared in person and by and through their attorneys of record and announced ready for said hearing, and all matters of fact as well as of law were submitted to the Court sitting without a jury, and the Court, having heard the pleadings, evidence and argument of counsel, finds as a fact that the relator is a citizen of Texas and of the United States and is above nineteen (19) years of age, and is scholastically qualified to enter the first year law class in the Law School of the University of Texas; that the respondents are administrative agents of the State of Texas; that the respondents are the duly appointed and legal administrative officers of the State of Texas and have [fol. 686] authority to admit qualified applicants to the

Law School of the University of Texas; that relator made his application for admission to the Law School of the University of Texas on the 26th day of February, 1946, and that at the time, he made his application he was scholastically qualified for admission to the first year law class of the University of Texas; that on the 15th day of March, 1946, relator's application was denied solely on account of his race and color.

(1) That under the Constitution and laws of the United States of America and of the State of Texas, the relator, being colored, is entitled to educational advantages and privileges equal to those offered to the white people of the State of Texas.

(2) That the Constitution and laws of the State of Texas provide for the segregation of the white and colored races in educational institutions maintained by the State of Texas; and that such laws are valid and subsisting and must be sustained by this Court unless they clearly and unmistakably deny to the relator his rights under the Constitutions of the United States and of the State of Texas.

(3) The Court further finds that the State of Texas, through its administrative agents and the Legislature of Texas, have provided for courses in law and facilities for teaching the same at the University of Texas for persons of the white or caucasian race, and that no provision has been made for the courses of law and the facilities for teaching the same substantially equivalent to those offered at the University of Texas for persons of African descent and of Negro blood; that an act of the 49th Legislature, being [fol. 687] Senate Bill 228, Chapter 308, page 506, places a mandatory duty upon the officers or agency named therein to provide university courses in law for the relator substantially equivalent to those provided at the University of Texas; and that the constitutional rights of the relator will be amply preserved if such a course in law is established within the State of Texas and made available to relator within a reasonable time from the date hereof.

The Court further finds that the denial of relator's application by respondents was a denial to the relator's equal protection of laws for the reason that no provision has been made for courses in law and facilities for teaching the same

for persons of African descent and of Negro blood at any school within the State of Texas supported by public funds while the courses of law and the facilities for teaching the same have been afforded to persons of the white or caucasian race.

It is therefore ordered that no writ of mandamus issue at this time and that if within six months from the date hereof a course for legal instruction substantially equivalent to that offered at the University of Texas is established and made available to the relator within the State of Texas in an educational institution supported by said State, the writ of mandamus sought herein will be denied, but if such a course of legal instruction is not so established and made available, the writ of mandamus will issue; and it is further ordered that this court retains jurisdiction of this cause; and that this cause be continued upon the docket of this court from term to term; and that at the expiration of said six months' period, towit, on the 17th day of December, 1946, at 10 o'clock a.m., a hearing will be held to determine the then existing facts and whether said Law School has [fol. 688] or has not been established; whereupon the Court will enter its final order herein.

This order made and entered on this the 26th day of June, 1946.

(S.) Roy C. Archer, Judge, 126th Judicial District Court of Travis County, Texas.

[File endorsement omitted.]

[fol. 689] In the 126th District Court of Travis County, Texas

[Title omitted]

Motion Showing Availability of Law School and Requesting Denial of Writ of Mandamus—Filed December 17, 1946

To the Honorable Judge of Said Court:

Come now Theophilus Shickel Painter, Charles Tilford McCormick, Edward Jackson Mathews, Dudley K. Woodward, Jr., Orville Bullington, E. E. Kirkpatrick, W. H. Scherer, W. Scott Schreiner, D. M. Strickland, C. O. Terrell, Edward B. Tucker, and David M. Warren, Respondents in the above entitled and numbered cause, acting herein by

and through Grover Sellers, the duly elected and qualified Attorney General of the State of Texas, and without waiving any pleas or exceptions heretofore filed but still insisting on same, respectfully show to the Court as follows:

I

That heretofore on the 17th day of June, 1946, this cause came on to be heard by this Honorable Court, and the Court [fol. 690] after hearing the evidence and the argument of counsel was of the opinion that if within a period of six months from the date of said hearing the law courses or legal training alleged to be desired by the Relator were made available to the Relator in an institution supported by the State of Texas, the writ of mandamus sought herein should be denied; that it was so ordered and decreed by the Court, and this cause was continued upon the docket of the Court from term to term; and a hearing on this 17th day of December, A. D., 1946, was set.

II

That it was found by the Court that Senate Bill 228, ch. 308, p. 506, Acts of the 49th Legislature, 1945, placed a mandatory duty upon an agency of the State of Texas to provide a law course substantially equivalent to that offered at the University of Texas; and that said act places such duty upon the Board of Directors of the Agricultural and Mechanical College of Texas directing that these courses will be provided by said Board at the Prairie View University.

III

That in compliance with the Court's order and decree, aforesaid, and in compliance with said Senate Bill 228, above cited, the Board of Directors of the Agricultural and Mechanical College of Texas have made available to the Relator, and other applicants for first year courses in law, the legal training alleged to be desired and have provided therefor by a resolution adopted at a meeting properly called and held on the 27th day of November, 1946, a copy [fol. 691] of which resolution is attached hereto as Exhibit "A" and by reference made a part hereof for all purposes.

IV

That the Board of Directors of the Agricultural and Mechanical College, acting within its legal authority so to

do, has included in the foregoing resolution the requirement that the Relator or other applicants for legal training offer themselves to the Registrar at the Prairie View University and present a suitable transcript and a certificate from the Dean of the Law School of the University of Texas that they are scholastically prepared for a course of law equivalent to that given at the University of Texas; and Respondents show that Relator by acting in good faith in the premises and presenting said transcript and certificate may now obtain at a State supported institution the legal training alleged to be desired by him beginning with the next regular term of the Prairie View University in February, 1947.

V

That there is a presumption in law that the said Board of Directors having adopted the resolution above mentioned will properly provide for the legal training of the Relator; and further that in the original hearing of this cause, it was stipulated that ample funds were available to provide for said legal training and law courses.

VI

That Relator's action herein was primarily based upon there being no other law course or legal training available to [fol. 692] the Relator at the time this suit was instituted and that by reason of the foregoing action by the Board of Directors of the Agricultural and Mechanical College, the basis of Relator's action has ceased to exist and that Relator can now by acting in good faith as aforesaid obtain the legal training alleged to be desired at the next term of the said State supported institution, Prairie View University; and Respondents further show that this Court by issuing a writ of mandamus could not cause the legal training to be offered to Relator at an earlier date than February, 1947, without arbitrarily disregarding the school terms maintained at State supported institutions.

VII

That by reason of the resolution aforesaid and Senate Bill 228 above cited, the legal duty to provide law courses or legal training alleged by Relator to be desired and resting with the Board of Directors of the Agricultural and

Mechanical College has been met; and that said legal duty does not rest with these Respondents.

Wherefore, premises considered, Respondents pray judgment of this Honorable Court that the writ of mandamus requiring them to admit Relator to the Law School of the University of Texas, as sought by the Relator herein, be denied, and that the Respondents go hence with their costs without day.

(S.) Grover Sellers, Attorney General of Texas; Jackson Littleton, Assistant Attorney General.

[fol. 693] RESOLUTION

Minute Order No. 203-46

Establishment of Law Course for Negro Students

On motion by Mr. Buchanan, seconded by Mr. Reese, and approved by a majority vote of the Board, the following resolution is adopted:

Whereas, by Senate Bill No. 228, of the 49th Legislature the name of Prairie View State Normal and Industrial College at Prairie View was changed to Prairie View University; and

Whereas, the act further provides that whenever there is any demand for same the Board of Directors of the Agricultural and Mechanical College of Texas is authorized to provide for a course in law at Prairie View University substantially equivalent to that offered at the University of Texas; (Other courses not pertinent to this order were also authorized.) and

Whereas, the Board of Directors of A. and M. College in cooperation with the University of Texas named a joint committee to study the obligations of these institutions in connection with Negro education and made a report to the Governor in connection therewith, said, (Minute Order No. 124-46), being attached to and made a part of this order; and

Whereas, the Board of Directors of the A. and M. [fol. 694] College of Texas strongly reaffirms the position taken in the recommendations made to the Governor, particularly that part which urges the establish-

ment of a first-class University for Negroes, preferably at Houston, Texas, under the supervision of the Board of Regents of the University of Texas; and

Whereas, it has been brought to the attention of the Board of Directors that at this time there is pending an application for admission to the University of Texas by one or more colored youth seeking to enroll in the School of Law, and this Board has been requested to make arrangements for these young men to embark on their legal studies pending final action by the Legislature on the recommendations made or to be made to its 50th session; and

Whereas, the Board of Directors has by investigation determined that arrangements may be made for standard courses of first-year law to be given in Houston, Texas with qualified Negro Lawyers as teachers:

Therefore, be it resolved

1. That if the applicant and/or similar other applicants for first-year courses in law offer themselves to the Registrar at Prairie View University, bringing with them a suitable transcript and a certificate from the Dean of the Law School of the University of Texas that they are scholastically prepared for a course of law equivalent to that given at the University of Texas, [fol. 695] they will be admitted to Prairie View University for the semester beginning February 1947.

2. The course will be offered in Houston, Texas and will be substantially the same approved course as is now offered by the University of Texas School of Law for entering students, and the qualifications of the personnel to teach the students will be determined by the State Board of Law Examiners, and they will be judged acceptable by it before instruction begins.

3. The Board of Directors of A. and M. College, through Prairie View University, will provide instruction in accordance with the requirements of the Supreme Court of Texas and the American Bar Association, and will provide or make available to the students such books or library material as are needed for the first-year course in which they will be enrolled. The Governor will be asked for a deficiency appropriation to provide the cost of instruction.

CERTIFICATE

I, E. L. Angell, certify that the foregoing is an exact copy of Minute Order No. 203-46 passed at the meeting of the Board of Directors of the Agricultural and Mechanical College of Texas held at Austin, Texas on November 27, 1946.

[fol. 696] In witness whereof, I have hereunto affixed my hand and seal of the said institution this 4th day of December, 1946.

(S.) E. L. Angell, Secretary, Board of Directors, Agricultural and Mechanical College of Texas. (Seal.)

[fol. 697] MINUTE ORDER No. 124-46

Higher Education for Negroes in Texas

On motion by Mr. Newton, seconded by Mr. Peeples, and approved by a majority vote of the Board, it was ordered that the following report of a Special Joint Committee of the A. & M. College of Texas and the Board of Regents of The University of Texas on "Higher Education for Negroes in Texas" be adopted:

The Board of Directors of The Agricultural and Mechanical College of Texas
College Station, Texas

The Board of Regents of The University of Texas
Austin, Texas

GENTLEMEN:

The undersigned special committee, authorized by your joint meeting held at Fort Worth, Texas, January 13, 1946, to inquire into the respective responsibilities of The Agricultural and Mechanical College of Texas and The University of Texas concerning higher education for negroes in Texas respectfully recommends that steps be taken to accomplish the following:

1

Reestablish at Prairie View, Texas the college for negroes offering instruction in agriculture and the

mechanic arts, including engineering, and providing both undergraduate and graduate instruction in these fields, as well as certain other vocational courses and teacher training now being offered at this institution, [fol. 698] and to conform to the requirements of the Land-Grant College Act.

2

For all other instruction, both graduate and undergraduate, establish a first-class university for negroes, preferably at Houston, Texas, to be supervised by the Board of Regents of The University of Texas, if so determined by the Legislature; to the end that all courses of study offered at The University of Texas or The Agricultural and Mechanical College of Texas will be provided at one of the two institutions.

3

To this end it is our opinion that our two Boards should petition the Governor of the State to appoint from its citizenship an outstanding biracial committee of such number as he may think appropriate for the purpose of reporting detailed plans for these schools to the Legislature for its consideration at the earliest practicable time.

Respectfully submitted, (S.) T. S. Painter, D. K. Woodward, Jr., Gibb Gilchrist, Chairman. (S.) T. D. Brooks, Scott Gaines, Henry Reese III.

[fol. 699] CERTIFICATE

I, E. L. Angell, certify that the foregoing is an exact copy of Minute No. 124-46 passed at the meeting of the Board of Directors of the Agricultural and Mechanical College of Texas held at Corpus Christi, Texas on July 13, 1946.

In witness whereof, I have hereunto affixed my hand and seal of the said institution this 4th day of December, 1946.

(S.) E. L. Angell, Secretary, Board of Directors, Agricultural and Mechanical College of Texas. (Seal.)

[File endorsement omitted.]

[fol. 700] IN DISTRICT COURT OF TRAVIS COUNTY

[Title omitted]

JUDGMENT OF THE COURT—Filed December 17, 1946

On this the 17th day of December, 1946, came on for hearing the Motion of the respondents in the above entitled and numbered cause pursuant to an order of this Court made and entered of record herein on the 26th day of June, 1946. All parties appeared in person or by their attorneys of record and announced ready for said hearing, and all matters of fact and law were submitted to the Court sitting without a jury, and the Court having heard the pleadings, evidence, and argument of counsel is of the opinion that the said order of June 26, 1946, has been complied with in that a law school or legal training substantially equivalent to that offered at the University of Texas has now been made available to the Relator and that the Relator may now obtain legal training within the State of Texas at the Prairie View University, an institution supported by said State, by presenting to the proper authorities a suitable transcript and a certificate from the Dean of the Law School of the University of Texas that he is scholastically prepared for legal training equivalent to that given at the University of Texas. And, further, the Court is of the opinion that provision for legal training for the Relator at said [fol. 701] Prairie View University does not constitute any abridgment or denial of his constitutional rights.

It is therefore ordered, adjudged and decreed that the Writ of Mandamus sought herein be in all things denied and that the costs hereof be assessed against the Relator.

To which action of the Court the relator in open Court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, sitting at Austin, Texas.

And to the action of the Court in overruling the exceptions of the respondents, the respondents except and in open Court give notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, sitting at Austin, Texas.

This order made and entered on this the 17th day of December, A. D. 1946.

Roy C. Archer, Judge, 126th District Court of Travis County, Texas.

[File endorsement omitted.]

[fol. 702] In District Court of Travis County

Mandate of the Court of Civil Appeals—Filed March 28, 1947

In the Court of Civil Appeals for the Third Supreme Judicial District, at Austin

On Wednesday, March 26, 1947.

Motion #10,363 Cause #9619

Heman Marion Sweatt

vs.

Theophilus Shickel Painter, et al

Appeal from District Court of Travis County

Motion for Substitution of Appellees

This day came on to be heard the motion of the appellees to strike the names of Orville Bullington, W. H. Scherer and D. M. Strickland as appellees in this cause and to substitute therefor William E. Darden, Mrs. Margaret Batts Tobin and James W. Rockwell. It appearing that the aforesaid Orville Bullington, W. H. Scherer and D. M. Strickland have ceased to be regents of the University of Texas and in their stead the aforesaid William E. Darden, Mrs. Margaret Batts Tobin and James W. Rockwell have been appointed and qualified as such regents, It is therefore ordered that said motion be substituted and that said substitution be and same is hereby made.

[fol. 703] 9619—Heman Marion Sweatt

vs.

Theophilus Shickel Painter, et al

Appeal from District Court of Travis County

No opinion Rendered.

This cause came on to be heard on the transcript of the record and the parties, both appellant and appellee appeared by their respective attorneys of record and in open court agreed that the judgment of the trial court in this

cause may be set aside and the cause remanded generally to the trial court for further proceedings without prejudice to the rights of any party to this cause: It is therefore considered, adjudged and ordered that the trial court's judgment in this cause be and the same is hereby set aside and the cause is remanded generally to the trial court for further proceedings without prejudice to the rights of any party to this suit. It is further Ordered that all costs of appeal in this cause be and the same are hereby taxed against the appellees herein in their respective official capacities, and that a copy of this Judgment be certified below for observance.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 704] [File endorsement omitted.]

[fol. 705] IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

[Title omitted]

RESPONDENT'S MOTION TO WITHDRAW STIPULATIONS—Filed May 12, 1947

To the Honorable Judge of Said Court:

Comes now Theophilus Shickel Painter, et al, Respondents in the above styled and numbe-d cause, before any of the parties hereto have announced ready for trial, on this the second and new trial of such cause, and would show the Court the following:

1. That on or about June 17, 1946, the date of the first trial of this cause, and for the purposes of facilitating the procedure thereof and saving the Court's time, a stipulation of facts was entered into and executed by all parties hereto. Such stipulation began "it is admitted by Relator and Respondent that the following facts are true and admitted in evidence upon *the trial* of this cause" (emphasis added.) That the stipulations were entered into for the purposes of *that* trial, with the facts as they were understood to be as of that time.

2. That subsequent to that trial, the facts and conditions have materially changed, so that the former stipulations [fol. 706] do not now reflect the true facts.

3. Specifically, the matter contained in the follow- numbered paragraphs is no longer accurate:

Sections 6, 10, 11, 12, 13, 17, 20, 21, 22

Among other material changes causing the above sections to be erroneous are those brought about by the last enactment of S. B. 140, 50th Leg., 1947. This Act repealed S. B. 228, Acts 49th Leg. (1945), which was effective when the above stipulations were executed. Further, the personnel of the Board of Regents of the University of Texas has changed, rendering stipulations as to the identity thereof erroneous.

All of these inaccuracies are material and are detrimental and prejudicial to the rights of Respondents.

4. Further, paragraphs 7 and 15, though entered into in good faith by all parties, have subsequent-y been found to contain statements which are incorrect and inaccurate.

The inaccuracies of section 7 and 15 are material, and are detrimental and prejudicial to the rights of the State.

5. The remainder of the stipulations formerly entered into, left standing above, and without the new facts which have subsequently come into being, leave such an erroneous and insomplete recital of the facts, as to render such stipulation useless and fa-lacious.

6. In the interest of shortening the record of this cause, and to conserve the Court's time, Respondents stand ready and willing to enter into and execute new stipulations. Respondents have been willing and desirous of entering into new stipulations since the reversal of this cause by the [fol. 707] Court of Civil Appeals. Relator's counsel has been appraised of such willingness. By letter, such counsel has indicated a willingness to stipulate anew; and on March 26, 1947, reiterated such willingness to stipulate as soon as amended pleadings were filed. However, no stipulations have been offered by Relator, and none have executed. Respondents have prepared a set of stipulations which they now offer to Relator in good faith.

Wherefor, it is respectfully prayed that the former stipulations of June 17, 1946, be in all things withdrawn; that they be not admitted in evidence; and that they form no part of the record in this cause.

(S.) Price Daniel, Attorney General of Texas.

[File endorsement omitted.]

[fol. 708] In District Court of Travis County

[Title omitted]

Order Extending March Term of Court—June 14, 1947

On this the 14th day of June, A. D. 1947, it appearing to the Court that he is in the midst of the trial of the above numbered and entitled cause and that the date for adjournment of the March Term, A. D. 1947, of the 126th Judicial District of Texas at Austin, Texas, has arrived and that there is insufficient time left during said term of said Court in which to complete the said pending trial of said cause, the Court deems it necessary and advisable that an extension of said term of said Court be granted in order that the Court may be able to complete the said pending trial of said cause;

It is therefore Ordered by the Court that this March Term, A. D. 1947, of the 126th Judicial District of Texas at Austin, Texas, be, and the same is, hereby extended solely for the purpose of terminating the trial of the above numbered and entitled cause until and including the 1st day of July, A. D. 1947, at which time, if found necessary, a further extension of said term of said Court for this cause may be had.

Entered this the 14th day of June, A. D. 1947.

Roy C. Archer, Judge, 126th Judicial District Court, Travis County, Texas.

[fol. 709] In District Court of Travis County

74,945 Heman Marion Sweatt

vs.

Theophilus Shickel Painter, et al

Judgment—Filed June 17, 1947

On the 12th day of May, 1947, came on for hearing the petition of the Relator, Heman Marion Sweatt, for Writ of Mandamus against the following officials of the University of Texas: Theophilus Shickel Painter, President; Charles Tilford McCormick, Dean of the School of Law; Edward Jackson Mathews, Registrar; and Dudley K. Woodward, Jr., E. E. Kirkpatrick, W. Scott Schreiner, C. O. Terrell, Edward B. Tucker, David M. Warren, William E. Darden, Mrs. Margaret Batts Tobin, and James W. Rockwell, Regents; who are the Respondents; and all parties appeared in person and by their attorneys of record and announced ready for said hearing, and all matters of fact as well as of law were submitted to the Court, without a jury, after the Court heard and passed upon the special exceptions of the parties as hereinafter set out.

And the Court, having heard the pleadings, evidence, and argument of counsel, finds as follows:

That this petition came on for hearing originally on the 17th day of June, 1946, and on the 26th day of June, 1946, an interlocutory order was entered finding that Relator, a [fol. 710] negro citizen seeking entrance to the School of Law of the University of Texas, was duly qualified, and under the Constitutions of the United States and the State of Texas, he was entitled to educational advantages and opportunities equal to those furnished by the State to white citizens; that the Constitution and laws of Texas provide for separate schools for the white and negro races, and that such laws were valid and did not abridge or deny Relator's constitutional rights so long as equal facilities were furnished Relator in a separate school; that a valid law, Senate Bill 228, Chapter 308, page 506, Acts of the 49th Legislature, 1945, placed a mandatory duty upon Prairie View University to establish a law school for negroes substantially equal to that of the University of Texas, and that establishment of such courses in law within a reasonable time would preserve the rights of Relator; and it was

thereupon ordered by this Court on June 26, 1946, that if within six months a course of legal instruction substantially equal to that offered at the University of Texas was established and made available to Relator in a State educational institution, the Writ of Mandamus would be denied; but if such a course was not so established and made available, the Writ of Mandamus would issue. Whereupon this Court retained jurisdiction and continued the cause until December 17, 1946.

Pursuant to the interlocutory order of June 26, 1946, the further hearing was held on December 17, 1946, and this Court, after having heard the pleadings, the evidence and the argument of counsel, was of the opinion that said order had been complied with, and that legal training substantially equivalent to that offered at the University of Texas had been made available to the Relator by establishment of the Prairie View University Law School in Houston, [fol. 711] Texas. Thereupon, the Writ of Mandamus sought herein was denied, and judgment was accordingly entered, from which judgment the Relator perfected his appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, in Austin, Texas.

During the pendency of said appeal, the 50th Legislature of the State of Texas convened in Regular Session and enacted Senate Bill 140, Acts 1947, Chapter 29, page 36, creating a new first class University, The Texas State University for Negroes, and appropriated the sum of $3,000,000.00 therefor. In Section 11 of said Act it was provided that Respondents herein would immediately provide for a new and separate school of law at Austin, Texas, to be known as the School of Law of the Texas State University for Negroes, and appropriated the sum of $100,000.00 for the establishment and maintenance thereof. By reason of this change in the law, and upon a showing by the Respondents that said new School of Law had been established, the parties hereto agreed before the Court of Civil Appeals, March 26, 1947, that this cause should be remanded for further proceedings, and the Court of Civil Appeals accordingly issued its mandate remanding the cause generally to this Court for further proceedings, without prejudice to either party.

And accordingly, upon this rehearing, having heard the pleadings, evidence and arguments, this Court is of the

opinion and finds from the evidence that during the appeal of this cause and before the present hearing, the Respondents herein, pursuant to the provisions of Senate Bill 140, Acts of the 50th Legislature, 1947, have established the School of Law of the Texas State University for Negroes [fol. 712] in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas; that Relator, although duly notified that he was eligible and would be admitted to said law school March 10, 1947, declined to register; that from his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages and opportunities for the study of law equal to those furnished by the State to the white students of the Law School of the University of Texas; and the constitutional right of the State to provide equal educational opportunities in separate schools being well established and long recognized by the highest State and Federal Courts, and the facts in this case showing that Relator would be afforded equal if not better opportunities for the study of law in such separate school, the petition for Writ of Mandamus should be denied.

It is, therefore, Ordered, Adjudged and Decreed:

1. That the exceptions of the Relator to the First Amended Original Answer of the Respondents, as well as the exceptions of the Relator contained in his Third Supplemental Petition be, and the same are hereby overruled, to which order the Relator in open court duly excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, Texas.

[fol. 713] 2. That the exceptions of the Respondents to the allegations of the Relator contained in Section III, 3, of Relator's Second Supplemental Petition relating to the quantity and quality of education offered at universities and colleges maintained by the State of Texas generally, be stricken from said pleading as being immaterial and irrelevant to the issues of whether a suitable law school

maintained by the State is available to the Relator, and that the evidence introduced by the Relator herein over objection of Respondents, concerning the facilities provided by other State universities and colleges (specifically that of the witness, Dr. Charles H. Thompson), be stricken from the record as beyond the scope of the pleadings and the issues, and immaterial and irrelevant thereto, to which the Relator in open court duly excepted, and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, Texas.

It is further Ordered that other exceptions presented by the Respondents herein to the Second and Third Supplemental Petition of the Relator be, and the same are hereby overruled.

3. That the Writ of Mandamus sought herein by the Relator be, and the same is hereby in all things denied, and that the costs hereof be assessed against the Relator, to which judgment the Relator in open court duly excepted, and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, Texas.

Entered of record on this the 17th day of June, 1947.
Roy C. Archer, Judge 126th Judicial District, Travis County, Texas.

[fol. 714] Approved as to form, Thurgood Marshall and W. J. Durham, Attys. for Relator. Approved as to form, Price Daniel, Attorney General of Texas, By Joe R. Greenhill, Executive Assistant.

[File endorsement omitted.]

[fols. 715-717] Bond on appeal for $1,000.00 approved and filed June 17, 1947, omitted in printing.

[fol. 718] In District Court of Travis County

[Title omitted]

Order of the Court Concerning Fact Stipulations—Filed June 17, 1947

On this the 17 day of June, 1947, came on to be heard the motion of T. S. Painter, et al, to strike the stipulations from

the record. And it appearing to the Court that counsel for relator and respondents are agreed that such stipulations should form no part of the record on this appeal, such stipulations not having been offered in evidence by either party on this trial, and it appearing to the Court that such stipulations should not form a part of the record on this appeal,

It is therefore Ordered, Adjudged, and Decreed that such stipulations form no part of the record in this case, and that they be not included in the transcript of this appeal.

Roy C. Archer, Presiding Judge.

[File endorsement omitted.]

[fol. 719] In District Court of Travis County

[Title omitted]

Order Closing March Term of Court—Filed July 1, 1947

On this the 1st day of July, 1947, it appearing to the Court that heretofore, to-wit on the 14th day of June, 1947, this Court was in the midst of the trial of the above numbered and entitled cause, and that the time for the expiration of the March Term, A. D. 1947, of the 126th Judicial District Court of Travis County, Texas, had arrived and that the Court deemed it advisable and necessary, in order to complete the said pending trial of said cause, that said term of said Court should be extended, made and entered its order granting an extension of said term of said Court for the said purpose only;

And it now appearing to the Court that a final judgment has been entered in said cause; that all motions, if any, to perfect an appeal, if desired, have been duly filed, acted upon and appropriate orders entered thereon;

The Minutes entered in said cause, having been examined in open Court, and the same being found correct, are hereby approved.

And this Court will now stand finally adjourned.

[fol. 720] Witness my hand at Austin, Texas, this the 1st day of July, 1947.

Roy C. Archer, Judge, 126th Judicial District Court, Travis County, Texas.

[File endorsement omitted.]

[fol. 721] IN THE 126TH DISTRICT COURT OF TRAVIS COUNTY, TEXAS

[Title omitted]

RELATOR'S MOTION RE ORIGINAL EXHIBITS—Filed July 8, 1947

To the Honorable Judge of Said Court:

Comes now the relator and respectfully shows to the Court:

I

That the relator's exhibits from one (1-8) to eight should be sent up to the Appellate Court with the record in this case in the original form for the reason that said exhibits can not be reproduced and placed in such form as to intelligently advise the Appellate Court of the contents thereof. That respondents' exhibits 4, 5, 8, 9, 10, 11, 12, 14, 15 and 16 and exhibits from A to J should be sent up with the record in this case in their original form for the said reason as hereinbefore set out in connection with relator's exhibits from two (2-8) to eight.

[fol. 722] Wherefore, Relator prays that the original exhibits hereinbefore described in this motion be sent up in their original form as a part of the record in this case.

W. J. Durham, Attorney for Relator, Heman Mation Sweatt.

[File endorsement omitted.]

[fol. 723] IN DISTRICT COURT OF TRAVIS COUNTY

[Title omitted]

ORDER DIRECTING CLERK TO SEND ORIGINAL EXHIBITS TO COURT OF CIVIL APPEALS—Filed July 8, 1947

On this the 8th day of July, 1947, relator's motion to send relator's original exhibits two (2-8) to 8 and respondents' exhibits 4, 5, 8, 9, 10, 11, 12, 13, 15, 16 and A to J, inclusive in the original form came on for hearing, and the Court is of the opinion that said motion should be granted.

It is therefore the order of this Court that relator's

exhibits two (2-8) to eight, inclusive and respondents' exhibits 4, 5, 8, 9, 10, 11, 12, 14, 15, 16 and A to J, inclusive, be sent to the Court of Civil Appeals in the original form and as a part of the record in this case, and the Clerk of this Court is directed to send said exhibits in their original form to the Court of Civil Appeals, 3rd Supreme Judicial District of Texas as a part of the record in this case.

[fol. 724] Roy C. Archer, Judge of the 126th District Court.

[fol. 725] In District Court of Travis County

[Title omitted]

Order Amending Judgment—July 8, 1947

On this the 7th day of July, 1947, came on for consideration a suggestion to the Court by Attorneys of record as to the recitation of the dates of the hearing in the Judgment of the Court heretofore entered in this cause, and it appearing to the Court that the suggestion was well made, and that the days during which the hearing was held should have been recited, and that the attorneys for both parties have agreed thereto.

It is, therefore, Ordered, and Decreed that the Judgment of the Court heretofore entered in this cause be supplemented to cure said omission and to show that all matters of fact as well as of law in said hearing were submitted to the Court without a jury on the 12th day of May, 1947, as recited in said Judgment, and from day to day thereafter until the 18th day of May, 1947, when both parties rested and the Court pronounced his judgment as heretofore entered.

Entered of Record on this the 8th day of July, 1947.

Roy C. Archer, Judge 126th Judicial District, Travis County, Texas.

[File endorsement omitted.]

[fol. 726] [Bill of Costs omitted in printing.]

[fol. 727] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 728] In Court of Civil Appeals for the Third Supreme Judicial District of Texas

No. 9684

Heman Marion Sweatt, Appellant,

vs.

Theophilus Shickel Painter et al., Appellees

Appeal from 126th District Court, Travis County

Opinion—Filed February 25, 1948

February 26, 1946, Heman Marion Sweatt, a Negro, applied for admission to the School of Law of the University of Texas as a first year student. Admittedly, he possessed every essential qualification for admission, except that of race, upon which ground alone his application was denied, under Sec. 7 of Art. 7 of the Texas Constitution, which reads:

> "Separate schools shall be provided for white and colored children, and impartial provision shall be made for both."

May 16, 1946, he filed this suit, as Relator, for a writ of mandamus, against the President, members of the Board of Regents, Dean of the School of Law, and Registrar of the University of Texas, as Respondents, to compel his admission, upon the ground that its denial constituted an infringement of rights guaranteed to him under the equal protection clause of the fourteenth amendment to the Federal Constitution. In a trial to the court the sought relief was denied and Relator has appealed.

At the outset it should be borne in mind that the validity of state laws which require segregation of races in state supported schools, as being, on the ground of segregation alone, a denial of due process, is not now an open question. The ultimate repository of authority to construe the Federal Constitution is the Federal Supreme Court. We cite

chronologically, in a note below, the unbroken line of deci-
[fol. 729] sions of that tribunal recognizing or upholding the validity of such segregation as against such attack.[1]

The gist of these decisions is embodied in the following excerpts from the opinion in Plessy v. Ferguson (Mr. Justice Brown[2] writing):

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms un-

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[1] (1878) Hall v. DeCuir, 95 U. S. 485, 24 L. Ed. 547;
(1896) Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256;
(1899) Cumming v. County Board of Education, 175 U. S. 528, 20 S. Ct., 197, 44 L. Ed. 262;
(1914) McCabe v. A T & S F R Co., 235 U. S. 151, 35 S. Ct. 69, 59 L. Ed. 169;
(1927) Gong Lum v. Rice, 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172;
(1938) Missouri v. Canada, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208;
(1948) Sipuel v. Oklahoma, — U. S. —, — S. Ct. — 92 L. Ed. 256;
A like uniformity is to be found in decisions of other Federal and State Courts. Their citation is not of importance here.

[2] Mr. Justice Henry Billings Brown was born in Lee, Massachusetts, March 2, 1836. His academic education was at Yale, and among his fellow students were Chauncey M. Depew and his later associates on the Supreme bench, Mr. Justice Brewer and Mr. Justice Shiras. His education in law was obtained at Yale and Harvard. In 1859 he moved to Michigan, where he practiced law until 1861. He then served as Deputy U. S. Marshal and Assistant District Attorney until 1868, when he became Judge of the Wayne County Circuit Court. In 1875 he was appointed U. S. District Judge by President Grant, and in 1890 Associate Justice of the U. S. Supreme Court by President Benjamin Harrison.

satisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

* * * * * * *

"The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages, has been frequently drawn by the courts."

[fol. 730] This holding had the express approval of Mr. Justice Harlan in the Cumming case, of Mr. Justice Taft in the Gong Lum case, and of Mr. Chief Justice Hughes in the Canada case. Its approval is implicit in the latest enunciation of that court on the subject (January 12, 1948) in the Sipuel case.

Relator's brief asserts:

"The record in the instant case for the first time presents testimony and documentary evidence clearly establishing that:

"(1) There is no rational basis for racial classification for school purposes.

"(2) Public schools, 'separate but equal' in theory are in fact and in practical administration consistently unequal and discriminatory.

"(3) It is impossible to have the equality required by the Fourteenth Amendment in a public school system which relegates citizens of a disadvantaged racial minority group to separate schools."

And further:

> "The doctrine of racially 'separate but equal' public facilities is merely a constitutional hypothesis which has no application where racial segregation is shown to be inconsistent with equality."
>
> • • • • • • •
>
> "Although separate school laws have been enforced by several states, an examination of the cases in the United States Supreme Court and lower courts will demonstrate that these statutes have never been seriously challenged nor their validity examined and tested upon a record adequately presenting the critical and decisive issues such as are presented by the record in this case:
>
> "(1) Whether there is a rational basis for racial classification for school purposes.
>
> "(2) Whether public schools, 'separate but equal' in theory are in fact and practical administration consistently unequal and discriminatory.
>
> "(3) Whether it is possible to have the equality required by the Fourteenth Amendment in a public school system which relegates citizens of a disadvantaged racial minority group to separate schools."

Implicit in these quotations is the assertion that race segregation in public schools, at least in the higher and pro- [fol. 731] fessional fields, inherently is discriminatory within the meaning of the fourteenth amendment, and cannot be made otherwise.

This assertion in effect impeaches the soundness of the various decisions of the Federal Supreme Court which hold to the contrary, as being predicated upon a purely abstract and theoretical hypothesis, wholly unrelated to reality. To so hold would convict the great jurists who rendered those decisions of being so far removed from the actualities involved in the race problems of our American life as to render them incapable of evaluating the known facts of contemporaneous and precedent history as they relate to those problems.

It is of course of the very essence of the validity of segregation laws that they provide for each segregated group

or class facilities and opportunities the equivalent, or (as often stated) substantial equivalent of those provided for the other group or class. Our constitution (quoted above) so provides. The brief asserts that there can be no "substantial equality," the two words being in themselves incompatible. This is of course true in pure, as distinguished from applied, mathematics. "Equality" like all abstract nouns must be defined and construed according to the context or setting in which it is employed. Pure mathematics deals with abstract relations, predicated upon units of value which it defines or assumes as equal. Its equations are therefore exact. But in this sense there are no equations in nature; at least not demonstrably so. Equations in nature are manifestly only approximations (working hypotheses); their accuracy depending upon a proper evaluation of their units or standards of value as applied to the subject matter involved and the objectives in view. It is in this sense that the decisions upholding the power of segregation in public schools as not violative of the fourteenth amendment, employ the expressions "equal" and "substantially equal" and as synonymous. The framers of the Texas constitution of 1876 recognized the necessity [fol. 732] (both inherent and under the 14th amendment) of "equal protection" in the must (shall) requirement (Art. 7, Sec. 7) of "impartial provision" for "both" races. The question, and we think the controlling one, which this appeal presents is whether under the record showing in this case the State at the time of the trial had provided and made available to Relator a course of instruction in law as a first year student, the equivalent or substantial equivalent in its advantages to him of that which the State was then providing in the University of Texas Law School. We are not dealing here with abstractions but with realities.

In the latter portion of Relator's brief the following proposition is asserted:

> "The expert testimony introduced at the trial establishes that there is no rational justification for segregation in professional education and that substantial discrimination is a necessary consequence of any separation of professional students on the basis of color."

The supporting evidence deals generally with the subject of race segregation in professional and other schools from

biological and other viewpoints, giving conclusions of scientists, educators and other experts in the several fields, and data compiled and conclusions reached in reports of surveys, etc. In so far as this evidence is directed against the policy of segregation the subject dealt with is outside the judicial function. The people of Texas, through their constitutional and legislative enactments, have determined that policy, the factual bases of which are not subjects of judicial review. See Watts v. Mann, 187 SW 2d 917, error ref.; 11 Am. Jur., §§ 142-144, pp. 82, et seq. The only appropriate judicial inquiry here is whether the facilities furnished and made available by the State to Relator as an applicant for a first year law course meet the test of due process under the fourteenth amendment.

Nor are we concerned here with whether the State has discharged its obligations under that amendment in other segregated fields or branches of education.

[fol. 733] For these reasons we hold that the trial court correctly excluded: 1) Relator's pleadings as to what happened at Prairie View in 1937 (Relator's first point); 2) evidence of Dr. Thompson regarding facilities at other state institutions and colleges (Relator's second point); and 3) evidence of Donald Murray regarding what happened at the University of Maryland in 1929-32 (Relator's third point).

The record shows that this cause was called for trial June 17, 1946, and after a hearing the court passed an interlocutory order, which, after reciting the (below) 1945 Act, provided that, if by December 17, 1946, "a course for legal instruction substantially equivalent to that offered at the University of Texas is established and made available to the relator within the State of Texas in an educational institution supported by the State, the writ of mandamus sought herein will be denied, but if such a course of legal instruction is not so established and made available, the writ of mandamus will issue." The cause was ordered held on the docket until December 17, 1946, on which date final judgment was entered denying the writ, upon a showing by Respondents that the A & M (Texas Agricultural and Mechanical College) Board had provided for a first year law school at Houston to open with the February 1947 semester, as a branch of Prairie View University. This judgment was set aside by this court March 26, 1947, and

the cause remanded generally, without prejudice to the rights of either party, upon agreement of counsel in open court. Thereafter (May 17-June 17, 1947) the cause was again tried, the judgment denying the writ, upon the specific finding by the court that in compliance with the Act of 1947 (noted below) the Respondents:

> "• • • have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and with [fol. 734] the same courses and the same instructors as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas; that Relator, although duly notified that he was eligible and would be admitted to said law school March 10, 1947, declined to register; that from his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages and opportunities for the study of law equal to those furnished by the State to the white students of the Law School of the University of Texas; and the constitutional right of the State to provide equal educational opportunities in separate schools being well established and long recognized by the highest State and Federal Courts, and the facts in this case showing that Relator would be afforded equal if not better opportunities for the study of law in such separate school, the petition for Writ of Mandamus should be denied."

The sufficiency of the evidence to support these findings and conclusions to the extent that the stated facilities provided by the State meet the requirements of due process, constitutes the controlling question in the case; upon which issue the record shows: Relator's application was the first ever made by a Negro for admission to the University of Texas Law School. It also appears to have been the first application of any Negro for admission to any other department or school of the University of Texas. The Prairie View Normal and Industrial School for Negroes was estab-

lished in the 1870's, and was operated under the governing board of the A. & M. Neither Prairie View nor any other state supported school for Negroes offered any courses in law. The name of Prairie View was changed by the Act of June 1, 1945, to Prairie View University; and it was provided:

> "Whenever there is any demand for same, the Board of Directors of the Agricultural and Mechanical College, in addition to the courses of study now authorized for said institution, is authorized to provide for the establishment of courses in law, medicine, engineering, pharmacy, journalism, or any other generally recognized college course taught at the University of Texas, in said Prairie View University, which courses shall be substantially equivalent to those offered at the University of Texas." (Acts 49th Leg., Ch. 308, p. 506.)

The Act of 1947 (S.B. 40, Ch. 29, Acts 50th Leg.) was passed and became effective March 3, 1947. It provided (inter alia) for the establishment of "The Texas State [fol. 735] University for Negroes" to be located at Houston, with a governing board of nine "to consist of both white and negro citizens of this State," and appropriated $2,000,000 for land, buildings and equipment, and $500,000 per annum for maintenance for the biennium ending August 31, 1949. And that:

> "The Texas State University for Negroes shall offer all other courses of higher learning, including, but without limitation, (other than as to those professional courses designated for The Prairie View Agricultural and Mechanical College), arts and sciences, literature, law, medicine, pharmacy, dentistry, journalism, education, and other professional courses, all of which shall be equivalent to those offered at the University of Texas. Upon demand being made by any qualified applicant for any present or future course of instruction offered at the University of Texas, or its branches, such courses shall be established or added to the curriculum of the appropriate division of the schools hereby established in order that the separate universities for Negroes shall at all times offer equal educational opportunities and training as that available to other persons of this state."

And further:

> "Sec. 11. In the interim between the effective date of this Act and the organization, establishment and operation of the Texas State University for Negroes at Houston, upon demand heretofore or hereafter made by any qualified applicant for instruction in law at the University of Texas, the Board of Regents of the University of Texas is authorized and required to forthwith organize and establish a separate school of law at Austin for negroes to be known as the 'School of Law of the Texas State University for Negroes' and therein provide instruction in law equivalent to the same instruction being offered in law at the University of Texas. The Board of Regents of the University of Texas shall act as the governing board of such separate law school until such time as it is transferred to the control of the Board of Directors of the Texas State University for Negroes."

For this latter purpose $100,000 was appropriated.

Pursuant to this Act the school for first year Negro law students was established at Austin. Relator was notified amply in advance of its opening on March 10, 1947, but did not and has not attended. A resume of the evidence showing the facilities, opportunities and advantages afforded by this school and a comparison thereof with those afforded by the University of Texas School of Law is set forth in an appendix to this opinion, copied in the main from Respond- [fol. 736] ents' brief, and approved and adopted by us as a fair statement of the evidence in this respect.

The evidence shows, on the part of the State of Texas, an enormous outlay both in funds and in carefully and conscientiously planned and executed endeavor, in a sincere and earnest bona fide effort to afford every reasonable and adequate facility and opportunity guaranteed to Relator under the fourteenth amendment, within the State's settled policy (constitutional and statutory) of race segregation in its public schools. We hold that the State has effectually accomplished that objective.

The trial court's judgment is affirmed.

Affirmed.

James W. McClendon, Chief Justice.

[File endorsement omitted]

Breaking the elements of the School of Law into component parts, the following evidence was deduced.

Entrance, Examination, Graduation, and Similar Requirements

The requirements for admission and fees, and regulations relating to classification of students, classwork, examinations, grades and credits, standards of work required, and degrees rewarded are exactly the same as those published in the latest published catalogue of The University of Texas and used at such institution.

The Faculty

The instructors at the School of Law of the Texas State University for Negroes were and are the very same professors which had taught or were teaching the same courses at The University of Texas Law School. They were the same instructors Sweatt would have had if he had been enrolled in The University of Texas. The instructions from the Board of Regents were to use all of the faculty of the University Law School, so far as necessary, in order to maintain a full curriculum at the Negro Law School until four more full-time professors could be employed for the Negro Law School. The budget provided for four professors at $6,000 per year—the same pay base for professors at The University of Texas. Each of the instructors devotes all of his time to teaching—each a full-time professor. None are engaged in the private law practice. With the small enrollment at the Negro Law School, the instructors would be more available to the students for consultation than they would be to students at The University of Texas with its large class of 150 to 175 students. The Dean and Registrar of the two law schools were respectively the same persons.

Curriculum

The curriculum at th[e] Negro Law School and at The University was exactly [th]e same; it was the same as that adopted in the latest U[ni]versity of Texas School of Law Bulletin. The courses o[f]ered beginning students at the Negro Law School were identical with those offered begin-

ning students at the University: Contracts, Torts, and Legal Bibliography. These courses, with the same professors, are set out in Respondent's Exhibit 7.

Classroom

The classroom requirements were identical. With much smaller classes, the Negro Law School would provide the student with the opportunity to personally participate in classroom recitations and discussions. In an average law class at The University of Texas Law School, an average student would be called upon to recite only an average of 1½ times a semester. In a smaller class the students would receive better experience and education; they would be called on more frequently, would be more "on their toes". The students would come to class better prepared because their chances of being called upon are much greater; there would be a greater pressure to keep up their daily work. Dean McCormick testified that "in the Negro Law [fol. 738] School he (Sweatt) would have gotten a good deal more personal attention from the faculty than he would have had he been in the large entering class in The University of Texas."

Library

At the time of trial, there were on hand in the School of Law of the Texas State University for Negroes books customarily used by the first-year class of the University, and other books which Miss Helen Hargrave, Librarian of the University Law School, thought would be useful. There were about 200 of these books. There were also available for transfer to the Negro Law School between 500 and 600 books from the University, plus gifts of between 900 and 950 books. In addition, the entire library of the Supreme Court of Texas was specifically made available to the Negro Law School by Section 11 of H. B. 240, Acts 50th Legislature. The Supreme Court Library is located in the State Capitol Building on the second floor. The Capitol grounds are some 20 feet from the Negro Law School, and the entrance is only about 300 feet from that School.

The Supreme Court Library contains approximately 42,000 volumes, which number is far in excess of the 7,500-book minimum requirement of the American Bar Association. Excluding duplicates, The University of

Texas Law Library contains 30,000 to 35,000 books. Counting duplicates, it contains around 65,000. These books serve 850 law students of The University of Texas.

In some respects the Supreme Court Library is stronger than that of the University. Being a Governmental Depository, the Supreme Court Library automatically receives many reports, such as those of administrative bodies. It is the strongest library in the South on State Session Laws. It contains Attorney General's Opinions, Tax Board Opinions, Workmen's Compensation Reports, and other items not carried by the University. The Supreme Court Library is more spacious for a student body of ten students than are the facilities at The University of Texas Law School Library, which are exceedingly crowded. There is no more confusion, and in most instances, less confusion in the Supreme Court Library than at the Law Library at the University because of the large number of persons using the latter.

On the other hand, the Supreme Court Library does not have as many textbooks, legal periodicals, or English reports as the University Law Library. The Court's Library contains the Harvard; Columbia, Yale, and Texas Law Reviews, and the American Bar Association Journal. It has the English Reports up to 1932. The Law Library of The University of Texas and that of the Supreme Court are substantially equal except for the texts, legal periodicals, and English Reports.

However, all of such texts, legal periodicals, and English Reports, not available in the Supreme Court Library, are readily available to the Negro Law School on a loan basis from the Law Library of The University of Texas.

In addition to the books in the Negro Law School and in the Supreme Court Library, and those available on a loan basis from the Law Library of The University of Texas, a complete law library is being procured, consisting of some [fol. 739] 10,000 law books, some of which are already available. The rest have been placed for order through the Board of Control for the School of Law of the Texas State University for Negroes. The list of the 10,008 books which will constitute the Negro Law School Library is set out in Respondent's Exhibit No. 8. Of such number 1,261 are immediately available, and 8,727 books were already requisitioned. Bids had already been requested on the 8,727

books requisitioned, and 23 bids were received. Orders have already been placed for 5,702 of the books, all deliverable within ten to sixty days. Wherever new books were available, they were ordered; second-hand books were only ordered where new ones were not available. The library requisitioned included 20 Law Reviews, Indices of legal periodicals, Citators, Digests, Restatements, textbooks, statutes, the complete West Publishing Company Reporter System, etc. The undisputed evidence is that the books ordered for the Negro Law School are sufficient to meet the requirements of the American Association of Law Schools.

The Physical Facilities

Whereas The University of Texas Law School has 3 classrooms for 850 students, the School of Law of the Texas State University of Negroes has two classrooms, plus a reading room, toilet facilities, and an entrance hall, for a much smaller student body. The two law schools possess approximately the same facilities for light and ventilation, ("There are ample windows and lights.") though most law schools, including The University of Texas, need artificial light in the daytime. The Negro Law School, assuming a class of 10 students, has a greater floor space per student.

The location of the Negro Law School is particularly good. It is directly north of the State Capitol, separated only by a 20-foot street. It is within 100 yards of the Supreme Court of Texas, the Court of Civil Appeals, the Attorney General's Office, and the Legislature. It is between the business district of Austin and The University of Texas —8 blocks south of the University, and hence 8 blocks nearer the business district.

The building housing the Negro Law School is a three-story building of brick construction. The first floor was occupied by the School at the time of trial, but the upper two stories of the building were available as needed. Before March 10, 1947, the premises were cleaned up and painted. The building has ample space to house the 10,000 volume library and leave sufficient space for classrooms and reading room.

Hon. D. A. Simmons, President of the Texas Bar Association 1937-38; President of the American Judicature So-

ciety 1940-1942; and President of the American Bar Association 1944-1945, testified:

> "In my opinion, the facilities, the course of study, with the same professors, would afford an opportunity for a legal education equal or substantially equal to that given the students at The University of Texas Law School."

Hon. D. K. Woodward, Jr., Chairman of the Board of Regents of The University of Texas, testified:

> [fol. 740] "What we set up there was a plant fully adequate to give the very best legal instruction for the only man of the Negro race who had ever applied for instruction in law at the University in about 63 years of the life of the School."
>
> • • • • • • •
>
> "I am talking as a man familiar with what it takes to provide a thorough training in law in the State of Texas, and I stated the facts within my own personal knowledge, that the facilities which the Board of Regents of the University set up in accordance with Senate Bill 140 are such as to provide the Relator in this case the opportunity for the study of law unsurpassed any time elsewhere in the State of Texas, and fully equal to the opportunity and instruction we are offering at the University any day."

Hon. Charles T. McCormick, Dean of the University of Texas Law School and President of the Association of American Law Schools, 1942, testified that the facilities at the Law School for Negro citizens furnished to Negro citizens an equal opportunity for study in law and procedure; that considering the respective use by the respective number of students, the physical facilities offered by the Negro Law School were substantially equal to those offered at The University of Texas Law School; and that: "I would say • • • the Negro student has at least equal and probably superior facilities for the study of law."

With reference to the membership requirements of the Association of American Law Schools, it was shown that the

Negro Law School, at the time of this trial, met the great majority of the 9 requirements:

(1) It is a school not operated as a commercial enterprise, and the compensation of any officer or member of its teaching staff is not dependent on the number of students or the fees received.

(2) It satisfies the entrance requirements, i.e., pre-legal training, etc.

(3) The school is a "full-time law school." The school work is arranged so that substantially the full working time of the student is required at the school.

(4) The conferring of its degrees is conditioned upon the attainment of a grade of scholarship attained by examinations.

(5) *No* special students are admitted. In this, the School's requirement is stronger than that of the Association, which permits such students under certain considerations.

(6) The 10,000 volume library ordered for the School is sufficient to meet the library requirements. The selection of the books is such as to conform with the Association's requirements. In addition, the Supreme Court Library of [fol. 741] 40,000 volumes is available plus loan privileges from the Law Library of the University of Texas.

(7) The seventh requirement is that the "faculty shall consist of at least four full-time instructors who devote substantially all of their time to the work of the school." The professors in this case are full-time professors in the sense that all of their time is devoted to teaching. However, all of their teaching is not done at the Negro school; they will also be teaching at the University.

(8) Provision has been made for keeping a complete and readily accessible individual record of each student.

(9) The requirement reads, "It shall be a school which possesses *reasonably adequate facilities* and which is conducted in accordance with those standards and practices generally recognized by member schools as essential to the maintenance of a sound educational policy." Dean Mc-

Cormick testified that in his opinion the Negro Law School met this requirement.

The testimony was that a two-year period is generally required before any law school may be admitted to membership in the Association of American Law Schools. Dean McCormick testified that he knew of no reason why the Negro Law School could not comply with all of those standards within that two-year period—before any entering student could graduate from the school.

[fol. 742] In Court of Civil Appeals for the Third Supreme Judicial District of Texas

No. 9684

Motion No. 10,502

Heman Marion Sweatt, Appellant,

vs.

Theophilus Shickel Painter et al., Appellees

Opinion on Appellant's Motion for Rehearing—Filed March 17, 1948

Point VII in the motion complains that this court "erred in ignoring testimony introduced by appellant and merely adopting appellees' interpretation of the evidence by attaching to its opinion, an appendix copied in the main from appellees' brief, and based its opinion and judgment on said appellees' brief, without making an independent evaluation of the record as to the comparative values of the two law schools as a basis for its opinion and judgment."

Implicit in the statement in our opinion that the resume of evidence set forth in the appendix was "approved and adopted by us as a fair statement of the evidence" in the stated respect, was the assertion (which we now make explicit) that we had made "an independent evaluation of the record as to the comparative values of the two law schools as a basis for its (our) opinion and judgment," and that from this "independent evaluation" we reached the conclusion and so held that the statement in the appendix contained a fair resume of the pertinent evidence, which we approved and adopted as our own.

It should always be held in mind that the members of this court are not the triers of fact. That is the function of the trial court. This court is one of review only. Where there is no evidence of sufficient probative value to support a judgment, we have the power to set it aside and render the judgment which the trial court should have rendered. We also have the power (when our jurisdiction in that regard is properly invoked) to set aside a judgment and order a [fol. 743] new trial on the facts, where the evidence so greatly preponderates against the judgment as, in our opinion, to require that it be set aside in the interest of justice. Our jurisdiction in this latter regard was not invoked in this case. See Wisdom v. Smith, — SW 2d —, 17 Sup. Ct. Reporter, 239; Hall Music Co. v. Robertson, 117 Texas 261, 1 SW 2d 857; Phillips v. Anderson, 93 SW 2d 171. However, we have carefully considered the evidence from that viewpoint as well as from that of its sufficiency as a matter of law; and were our jurisdiction in that regard properly invoked we would be constrained to hold that its preponderance and overwhelming weight support the trial court's judgment and the specific fact findings therein which are quoted in our original opinion; if in fact it does not conclusively do so, as a matter of law.

The motion in overruled.

James W. McClendon, Chief Justice.

Overruled.

[File endorsement omitted.]

[fol. 744] [File endorsement omitted]

IN THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

[Title omitted]

APPELLANT'S MOTION FOR REHEARING—Filed March 11, 1948

This case was tried without a jury and no assignments of error were required; and appellant presents his Motion for Rehearing upon the points presented in this Court on the original heari.g, together with the other errors of the Court of Civil Appeals in affirming the judgment of the trial Court.

Now comes Heman Marion Sweatt, appellant in the above entitled cause, and respectfully moves the Court to set aside the judgment of this Court rendered on the 25th day of February, 1948 affirming the judgment of the lower court and to grant a rehearing herein.

[fol. 745]

I

The Court of Civil Appeals erred in overruling and not sustaining appellant's First Point, reading:

The error of the Court in sustaining appellees' special exception to Allegation 3 of appellant's second supplemental petition (Paragraph 3, Relator's Second Supplemental Petition, T.R page —).

II

The Court of Civil Appeals erred in overruling and not sustaining appellant's Second Point, reading:

The error of the Court in excluding the testimony of the witness, Dr. Charles H. Thompson, with reference to the quantity and quality of education offered at the universities and colleges other than Prairie View College, maintained by the State of Texas. (S. F. beginning with the testimony on page 380 and ending on page 469, inclusive).

III

The Court of Civil Appeals erred in overruling and not sustaining appellant's Third Point, reading:

The error of the trial court in excluding the evidence of the appellant as to the admission of Donald Murray to the Law School of the University of Maryland and the results thereof in a situation analogous to the instant case as shown in appellant's bill of exception as fully set out. (S.F. beginning on page 478 to page 482, inclusive).

IV

The Court of Civil Appeals erred in overruling and not sustaining appellant's Fourth Point, reading:

The Court erred in holding that the proposal of the State to establish a racially segregated law school afforded the equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United

States; and thus justifies the denial of appellant's petition for admission to the Law School of the University of Texas.

[fol. 746]

V

The Court of Civil Appeals erred in affirming the trial court's judgment in holding that Article 7, Section 7 of the Constitution of the State of Texas was not unconstitutional in that the enforcement thereof against appellant denied to the appellant, that equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and thus held that the appellees had the legal authority under such Article to deny appellant's admission to the Law School of the University of Texas.

VI

The Court of Civil Appeals erred in failing to hold that Article 7, Section 7 of the Texas Constitution, and the laws of Texas enacted pursuant thereto, were based upon no real distinction or actual difference; and therefore, violated the appellant's right under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

VII

The Court of Civil Appeals erred in ignoring testimony introduced by appellant and merely adopting appellees' interpretation of the evidence by attaching to its opinion, an appendix copied in the main from appellees' brief, and based its opinion and judgment on said appellees' brief, without making an independent evaluation of the record as to the comparative values of the two law schools as a basis for its opinion and judgment.

VIII

The Court of Civil Appeals erred in holding that the question of whether segregation in state-supported schools is a denial of due process is no longer an open question; because, in doing so, the Court thereby erred in not considering appellant's contention that the action of appellees denied appellant the equal protection of the laws guaranteed by the [fol. 747] Fourteenth Amendment to the Constitution of the United States.

IX

The Court of Civil Appeals erred in holding that the appellant was not entitled to the relief sought, and that the judgment of the court below should be affirmed; and citing as a basis for said judgment and opinion, the opinions of the Supreme Court in the cases of Pleasy vs. Ferguson and Hall vs. DeCuir as the grounds for said judgment and opinion, for the reason that said decisions were predicated upon a purely abstract and theoretical hypothesis, wholly unrelated to the realities; and for the further reason that the record in this case demonstrates, for the first time in any case presented for decision, the inevitable inequalities in a segregated school system.

Appellant respectfully prays that this motion be granted; and that upon final hearing, the judgment heretofore rendered be set aside and the judgment of the trial court be reversed and rendered, with instructions to the appellees to admit the appellant to the Law School of the University of Texas.

Appellant represents that the Honorable Price Daniels, Attorney General of the State of Texas, whose residence is Austin, Texas, is attorney for appellees.

W. J. Durham, Thurgood Marshall, Attorneys for Appellant.

Thurgood Marshall, 20 W. 40th Street, New York City 18; W. J. Durham, 814½ N. Good Street, Dallas 1, Texas.

I do hereby certify that I, W. J. Durham, one of the attorneys for the appellant, have on this the 10th day of March, 1948, mailed to the Honorable Price Daniels, Attorney for Appellees, whose address is Office of The Attorney General, Austin, Texas, a copy of this Motion for Rehearing.

W. J. Durham.

[fol. 748] IN COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

No. 9684

HEMAN MARION SWEATT

vs.

THEOPHILUS SHICKEL PAINTER et al.

Appeal from 126th District Court of Travis County

Opinion by CHIEF JUSTICE MCCLENDON:

JUDGMENT—February 25, 1948

This Cause came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the court that there is no error in the judgment, It Is Therefore considered, adjudged and ordered that the judgment of the trial court be, and same is hereby in all things affirmed; that the appellant, Heman Marion Sweatt as Principal and E. E. Ward and C. E. Jones as sureties on the cost bond filed herein, pay all costs in this behalf expended, and that this decision be certified below for observance.

IN COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

ORDER OVERRULING APPELLANT'S MOTION FOR REHEARING—March 17, 1948

Appeal from 126 District Court of Travis County, Appellant's Motion for Rehearing. Motion is Submitted and Overruled

(Opinion by CHIEF JUSTICE MCCLENDON.)

[fol. 749] IN SUPREME COURT OF TEXAS

No. A-1695

HEMAN MARION SWEATT

vs.

THEOPHILUS SHICKEL PAINTER et al.

From Travis County, Third District

JUDGMENT REFUSING APPLICATION FOR WRIT OF ERROR—September 29, 1948

This day came on to be heard the application of petitioner for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that the application be refused; that applicant, Heman Marion Sweatt, and his sureties, E. E. Ward and C. E. Jones, pay all costs incurred on this application.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 750] [File endorsement omitted]

IN THE SUPREME COURT OF TEXAS

[Title omitted]

MOTION FOR REHEARING ON THE PETITION FOR WRIT OF ERROR ON BEHALF OF HEMAN MARION SWEATT, PETITIONER, IN CAUSE #9684 IN THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, WHEREIN THEOPHILUS SHICKEL PAINTER, ET AL., ARE RESPONDENTS—Filed October 13, 1948

To the Supreme Court of Texas:

Petition for writ of error herein filed by Petitioner on April 17, 1948, having been denied by this Court on September 29, 1948,

Now Comes Heman Marion Sweatt, Petitioner in the above entitled cause and respectfully moves this court to set aside the judgment of this court herein rendered on the 29th day of September, 1948, refusing the petition for writ of error and to grant a rehearing for the following reasons:

I

The Court erred in refusing to grant said petition and in failing to hold that the *validity under the Federal Constitution and the Fourteenth Amendment and of statutes requiring segregation in Education where the claim is made that the segregated facilities are unequal presents a novel and important question which should be passed upon by the highest court of the State.*

The trial of this cause and the exception to the exclusion of evidence by the trial court present a factual picture in [fol. 751] support of the contention of the petitioner herein that the segregated educational facilities offered by the State of Texas are unequal. The question has never before been raised in this court in connection with the facilities offered by the State of Texas for graduate education in the field of law. The determination of the issues in this case will have a serious consequence for the petitioner and for all persons similarly situated. In the light of the novel and serious nature of the issues raised, this court should grant to the petitioner an opportunity to present argument and to have a full hearing upon the merits of his contention that the statutes as applied to him are unconstitutional and also that the refusal of the trial court to admit evidence on vital and relevant issues deny to petitioner due process of law.

II

The Court erred in refusing said petition for writ of error for the reason that the *petitioner was denied a fair hearing and due process of law by the refusal of the trial court, affirmed by the Court of Civil Appeals to admit testimony and evidence with reference to the difference in education at white and colored colleges and universities maintained by the State of Texas.*

In support of his allegation that the segregation statutes of Texas were invalid under the Fourteenth Amendment of the United States Constitution, the petitioner sought to

show that in every instance the State of Texas was providing fewer educational opportunities and an educational opportunity of poorer quality to Negro citizens than were offered to white citizens. Evidence in support of this contention was necessary for a fair determination of the issue involved. The refusal of the trial court to admit testimony of Dr. Charles H. Thompson with reference to the quantity [fol. 752] and quality of education offered at the universities and colleges other than Prairie View College maintained by the State of Texas denied to the petitioner the due process of law in that it prevented him from presenting competent and relevant evidence on an issue fundamental to the determination of petitioner's rights.

III

The Court erred in not holding that *the petitioner was denied a fair hearing and due process of law by the refusal of the Trial Court, affirmed by the Court of Civil Appeals, to admit testimony as to the results of unsegregated education in other states.*

The validity of laws requiring segregation was said to be established by the state on the ground that it was necessary for the maintenance of peaceful and harmonious relations between the Negro and the white race in Texas. The statute was alleged to have been enacted under the police power of the state and to be justified as a necessary measure.

The refusal of the trial court, affirmed by the Court of Civil Appeals, to admit testimony as to the admission of a Negro student, Donald Murray, to the Law School of the University of Maryland, after a law suit challenging the constitutionality of the segregation statutes of Maryland, and the court's refusal to hear any testimony as to the harmonious and peaceful race relations resulting from the admission of Negro students to the law school of the University of Maryland, denied to petitioner an opportunity to present relevant testimony in support of his contention that the constitutionality of the segregation statutes of Texas could not be supported by resort to the police power of the State. The exclusion of this evidence of a material fact necessary for the determination of the constitutionality of a statute restricting the individual liberty within the state denied to petitioner the due process of law.

[fol. 753] IV

The Court erred in its *refusal to hear argument and determine on the merits the grave question of individual liberty of Federal Constitutional rights denies to petitioner the due process of law.*

The question presented by the petition for writ of error and the issues raised by the petitioner's contention that the statutes requiring segregation in education are an infringement upon his personal liberty and a denial of property and a denial of the equal protection of the laws all in violation of the Fourteenth Amendment of the Constitution of the United States are of vital importance to petitioner's future education and to the future education of all persons similarly situated. In presenting the evidence and testimony in support of his allegations of unconstitutionality, petitioner was hampered by the refusal of the lower court to admit relevant testimony and was thus denied a fair hearing within the meaning of the guarantee of due process of law and the Fourteenth Amendment.

Further the decision of the Court of Civil Appeals summarily rejecting petitioner's contention that the statute was unconstitutional upon the theory that the constitutionality of the segregation statute could be established without regard to the quality of the facilities provided thereunder likewise constituted a denial of due process of law.

Unless this Court grant petitioner's hearing upon the merits in order to determine whether these grave constitutional issues can be decided without determining the equality of the facilities afforded to the segregated group under the statutes, petitioner will have been denied a hearing on relevant material matters necessary for the determination of his rights. Failure of the state judicial machinery to provide such a hearing for petitioner on such a vital issue constitutes a denial of due process of law.

[fol. 754] V

This Court erred in holding that the proposal of the State of Texas to establish a racially-segregated law school afforded the equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and thus, justified the denial of petitioner's application for admission to the Law School of the University of Texas.

VI

This Court erred in refusing petitioner's writ of application, thereby affirming the judgment of the Court of Civil Appeals and the Trial Court and holding that Article VII, Section 7, of the Constitution of Texas was not unconstitutional, in that the enforcement thereof against petitioner denied to the petitioner that equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and thus, held that Respondents had the legal authority, under such Article of the Constitution, to deny petitioner admission to the Law School of the University of Texas.

VII

This Court erred in refusing such petition for writ of error and approving the judgment of the Trial Court and the Court of Civil Appeals that Article VII, Section 7 of the Texas Constitution and the Statutes of Texas enacted pursuant thereto segregating races solely on account of race and color, and not based upon any real distinction or actual difference, did not violate the petitioner's right under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, petitioner respectfully prays that this motion be granted; that upon hearing, the judgment heretofore rendered be set aside, and that this cause be reversed and rendered, and for such other orders as the law requires.

Petitioner represents that the Honorable Price Daniel, Attorney General of the State of Texas, whose residence is [fol. 755] Austin, Texas, is attorney for Respondent.

Thurgood Marshall, 20 W. 40th Street, New York, N. Y.; W. J. Durham, P. O. Box 641, Dallas 1, Texas, Attorneys for Petitioner.

I do hereby certify that I, W. J. Durham, one of the attorneys for Petitioner, have on this the 12th day of October, 1948, mailed to the Honorable Price Daniel, attorney for Respondents, whose address is Office of the Attorney General of Texas, Austin, Texas, a copy of this motion for rehearing.

W. J. Durham, Attorney for Petitioner.

[fol. 755a] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 756] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—October 27, 1948

The motion for rehearing filed herein by the petitioner having heretofore been submitted to the Court, and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 757] IN THE COURT OF CIVIL APPEALS FOR THE THIRD JUDICIAL DISTRICT OF TEXAS

[Title omitted]

AGREEMENT TO SEND ORIGINAL EXHIBITS UP TO THE SUPREME COURT OF THE UNITED STATES IN ORIGINAL FORM—Filed Nov. 24, 1948

It is agreed between counsel for appellant and counsel for appellees that all the original exhibits introduced upon the trial of this case in the Trial Court by both plaintiff and defendant shall be sent to the Supreme Court of the United States in original form with the transcript and statement of facts which are now on file in the original form in the Court of Civil Appeals for the Third Supreme Judicial District Court of Texas, said exhibits having been sent to the Court of Civil Appeals in original form by order of the Trial Court. That said exhibits are to be returned to the Court of Civil Appeals for the Third Judicial District of Texas after a final disposition has been made of this case by the Supreme Court of the United States.

Dated this the 22nd day of November, 1948.

Price Daniel, Attorney General of Texas, by Joe R. Greenhill, Executive Assistant Attorney General; Attorneys for Appellees: Theophilus Shickel Painter, Charles Tilford McCormick, Edward Jackson Mathews; Board of Regents: Dudley K. Woodward, Jr., E. E. Kirkpatrick, W. Scott Schreiner, C. O. Terrell, Edward B. Tucker, David M. Warren, William E. Darden, Mrs. Margaret Batts Tobin and James W. Rockwell. Thurgood [fol. 757-A] Marshall, W. J. Durham; Attorneys for Appellant Heman Marion Sweatt, P. O. Box 641, Dallas, Texas.

[File endorsement omitted.]

[fol. 758] [Bill of costs omitted in printing.]

[fol. 759] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 760] SUPREME COURT OF THE UNITED STATES

No. , October Term, 1948.

HEMAN MARION SWEATT, Petitioner,

v

THEOPHILUS SHICKEL PAINTER, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 23d, 1949.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 12th day of January, 1949.

[fol. 761] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 7, 1949

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, ~~1948~~ '49

No. ~~667~~ 44

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *ET AL.*

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

W. J. DURHAM,
WILLIAM H. HASTIE,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
THURGOOD MARSHALL,
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Of Counsel.

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ARGUMENT

I. The question whether a state which undertakes to provide legal education for any of its citizens can satisfy the requirements of the equal protection clause of the Fourteenth Amendment by establishing a law school for Negroes separate from the law school it provides for all other persons is of great public importance and should be decided by this Court in this case 17

II. The inconsistency between the judicial approval of laws imposing racial distinctions in *Plessy* v. *Ferguson* and the judicial disapproval of similar distinctions and classifications in more recent decisions should lead this Court to review and disavow the doctrine of *Plessy* v. *Ferguson* 23

III. This Court should review and reverse the judgment below to prevent the several states from being free to restrict Negroes to public educational facilities clearly inferior to those provided for all other persons similarly situated through the device of arbitrary judicial decision that such discriminatory action provides "substantial equality" 28

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Shelley v. Kraemer, 334 U. S. 1 ..... 14, 25

Sipuel v. Board of Regents, 332 U. S. 631 ..... 2, 23, 25, 30

Skinner v. Oklahoma, 316 U. S. 535 27

Smith v. Cahoon, 283 U. S. 553 27

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Southern Ry. Co. v. Greene, 216 U. S. 400 27

State, ex rel. Michael v. Whitham, 179 Tenn. 250 29

State, Garnes v. McCann, 21 Ohio St. 210 24

Strauder v. West Virginia, 100 U. S. 303 25

Takahashi v. Fish & Game Commission, 332 U. S. 410 ..... 14, 25

Truax v. Corrigan, 257 U. S. 312 27

Truax v. Raich, 239 U. S. 33 26

Virginia v. Rieves, 100 U. S. 313 26

Ward v. Flood, 48 Cal. 36 24

Wrighten v. Board of Trustees, 72 F. Supp. 948 ..... 24, 29

Yick Wo v. Hopkins, 118 U. S. 356 25

Other Authorities

Argument of Charles Sumner, Esq., Against the Constitutionality of Colored Schools in the case of *Sarah C. Roberts* v. *Boston*, 1849 20

Ballantine, The Place in Legal Education of Evening and Correspondence Law Schools, 4 Am. Law School Rev. 369 (1918) 21

Boyer, Smaller Law Schools, Factors Affecting Their Methods and Objectives, 20 Oregon Law Rev. 281 (1941) 21

"Higher Education for American Democracy," *A Report of the President's Commission on Higher Education*, U. S. Government Printing Office, Washington, December, 1947 19

Holmes, "The Use of Law Schools" in Collected Legal Papers (1920) 21

PAGE

Journal of Negro Education (1945), Vol. XIV, Fall Number 19

McCormick, The Place and Future of the State University Law School, 24 N. C. L. Rev. 441 ..... 21, 22

Otto Klineberg, Negro Intelligence and Selective Migration (N. Y., 1935) 22

Peterson & L. H. Lanier, "Studies on the Comparative Abilities of Whites and Negroes," Mental Measurement Monograph, 1929 22

Report of Board of Officers on Utilization of Negro Manpower in the Post-War Army (February, 1946) 18

Simpson, "The Function of a University Law School," 49 Harv. L. Rev. 1068 ..... 20, 22

Sixteenth Census of the United States, Vol. III, Part IV (1940) 20

Stone, "The Public Influence of the Bar," 48 Harv. L. Rev. 1 22

The Black and White of Rejections for Military Service, Montgomery, Ala., American Teachers Association, 1944 ..... 18, 22

"To Secure These Rights," *The Report of the President's Committee on Civil Rights*, U. S. Government Printing Office, 1947 18

Townes, Organization and Operation of a Law School, 2 Am. Law School Rev. 436 (1910) 21

IN THE

Supreme Court of the United States

October Term, 1948

No.

HEMAN MARION SWEATT,
Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas denying his application for writ of error to review the judgment of the Court of Civil Appeals which had affirmed the judgment of the District Court of Travis County dismissing petition for writ of mandamus to compel respondents to admit petitioner to the University of Texas School of Law.

PART ONE

SUMMARY STATEMENT OF THE MATTER INVOLVED

I

Statement of the Case

This case is believed to present for the first time in this Court a record in which the issue of the validity of a state constitutional or statutory provision requiring the separation of the races in professional schools is clearly raised.[1] It is the first record which contains expert testimony and other convincing evidence showing the lack of any reasonable basis for racial segregation at the professional school level, its inherent inequality and its effect on the students, the school and the state.

Over a period of two years three hearings were held in the trial court. The first presented a situation in which the state excluded Negroes entirely from its state-supported law school facilities. The second came after the state had proposed to undertake the establishment of a Negro law school, and the third hearing took place subsequent to a specific tender of segregated legal training of sorts by the state. Throughout the three hearings, petitioner challenged the validity of the constitutional and statutory provisions of the state requiring racial segregation of students and the resulting exclusion of petitioner from the law school of the University of Texas because of his race as contravening the Fourteenth Amendment.

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[1] There are two other cases involving a similar question. *McLaurin* v. *Oklahoma State Regents, et al.*, No. 614, October Term, 1948 is now pending before this Court on direct appeal. *Sipuel* v. *Board of Regents, et al.*, 332 U. S. 631 was retried in the local court, and a record made including testimony of experts in the fields of legal training, anthropology and sociology. That case is now pending on appeal before the Supreme Court of Oklahoma.

First Hearing

On May 16, 1946 petitioner filed in the 126th District Court of Travis County, Texas, a petition for a writ of mandamus alleging that he had been refused admission to the law school of the University of Texas solely because of race and color (R. 403-408). On June 17, 1946 a hearing was held, and on June 26th the district court entered an order finding that the refusal to admit petitioner was a denial of the equal protection of the laws for the reason that no provision had been made for legal training for him. The court, however, refused to grant the writ at that time and gave the respondents six months to provide a course of legal instruction substantially equivalent to that afforded at the University of Texas setting the next hearing date for December 17th (R. 424-426).

Second Hearing

At the December 17th hearing it appeared that the state had done no more than authorize the instruction of Negroes at a non-existent law school to be established at Houston (R. 426-432). Yet, the district court entered a final order dismissing the petition for a writ of mandamus on the ground that "the said order of June 26, 1946 has been complied with in that a law school or legal training substantially equivalent to that offered at the University of Texas has now been made available to the Relator" (R. 433).

This judgment was appealed to the Court of Civil Appeals, and on March 26, 1947 the judgment of the trial court was set aside without opinion and the cause remanded generally for further proceedings without prejudice (R. 434-435).

Hearing on the Merits

On May 1, 1947 respondents filed their first amended original answer alleging that "The Constitution and laws

of the State of Texas require equal protection of the law and equal educational opportunities for all qualified persons but provide for separate educational institutions for white and Negro students" (R. 415). It was further alleged that the refusal to admit petitioner was therefore not arbitrary or in violation of the Constitution of the United States since "equal opportunities were provided for relator in another state-supported law school" (R. 415).

On May 8, 1947 relator filed his second supplemental petition pointing out that the proposed law school for Negroes did not meet the requirements of the equal protection clause and that the continued refusal to admit petitioner to the law school of the University of Texas was in violation of the Fourteenth Amendment and that "insofar as respondents claim to be acting under authority of the Constitution and laws of the State of Texas their continued refusal to admit the relator to the law school of the University of Texas is nevertheless in direct violation of the Fourteenth Amendment to the Constitution of the United States" (R. 412). It was also alleged that "such constitutional and statutory provisions of the State of Texas as applied to Relator are in direct violation of the Fourteenth Amendment to the Constitution of the United States" (R. 413).[2]

Thereafter, respondents filed their first supplemental answer reaffirming their reliance upon the validity of the provisions of the Constitution and laws of Texas requiring racial segregation in public education (R. 420).

From May 12 to May 18, 1947, hearing was had and testimony was taken before the district court, sitting without

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[2] At the trial of this case, the responsible officials of the University of Texas made it clear that they refused admission to the petitioner because of the Constitution and laws of Texas requiring segregation of the races in public education (R. 40-41, 56, 161).

a jury, and on June 17, 1947 judgment was entered for respondents. The judgment concluded that "the constitutional right of the State to provide equal educational opportunities in separate schools being well established and long recognized by the highest state and federal courts, and the facts in this case showing that Relator would be offered equal *if not better opportunities* for the study of law in such separate school, the petition for Writ of Mandamus should be denied" (R. 440). (Italics ours.)

The Court of Civil Appeals affirmed the judgment of the lower court on February 25, 1948 (R. 445-460). Motion for rehearing was filed on March 11, 1948 (R. 461-464) and was denied on March 11, 1948 (R. 465), with opinion appearing in the record at pages 460-461.

On September 29, 1948 application for writ of error to the Supreme Court of Texas was denied without opinion, and on October 27, 1948 motion for rehearing was overruled (R. 471).

On January 12, 1949 this Court issued an order extending time to file this petition for writ of certiorari up to and including March 23, 1949 (R. 472).

II

Summary of Testimony

The testimony offered by the respondents was limited to the question of the alleged physical equality between the law school at the University of Texas and the law school for Negroes. The respondents produced no evidence to justify the state's constitutional and statutory provisions requiring the segregation of the races in public law schools. On the other hand, petitioner offered the uncontradicted testimony of expert witnesses showing: (1) that there is

no rational basis for compulsory racial segregation in public education; (2) that there are no recognizable racial differences as to capacities between students of different races; and (3) that compulsory racial segregation in public education is harmful to the students of all groups and the community. Petitioner also produced expert testimony showing that it is impossible for a law school student to get an education in a school limited to one racial group equal to that obtained in a law school to which all other groups are freely admitted. Expert testimony offered by the petitioner also showed the inevitable inequalities inherent in a public school system maintained on a basis of racial segregation.

A

The Two Law Schools

Although Negroes have always been excluded from the University of Texas because of their race or color, the State of Texas has never offered them "separate but equal" facilities (R. 56). As Dean Pettinger, a witness for respondents who has studied educational facilities for Negro and white students in Texas for thirty years, stated: "I am unable to think for the moment of colored institutions and white institutions which do have equal facilities with which I have been associated" (R. 33).

When petitioner applied for a legal education the only law school in existence maintained by the State of Texas was the one at the University of Texas (R. 425).

The University of Texas has been in existence since the last century. The law school has been in existence for more than fifty years and is recognized and accredited by every association in the field (R. 90-91). The Negro school had just been opened in March, 1947 and was not accredited by any agency (R. 96, 25).

Physical Plant

The proposed Negro law school was to be set up in the basement [3] of a building in downtown Austin consisting of three rooms of moderate size, one small room and toilet facilities (R. 36). There were no private offices for either the members of the faculty or the dean. The space for this law school had been leased for a period from March to August 31, 1947 at $125 a month, and the authorities were negotiating for a new lease after that period (R. 41). It was freely admitted that "there is no fair comparison in monetary value" between the two schools (R. 43). There was no assurance as to where the proposed law school would be located after August 31st, and it was not even certain as to what city it would be in after August 31st (R. 52-53).

Library

While the law school at the University of Texas had a well-rounded library of some 65,000 volumes (R. 133), the proposed Negro school had only a few books, mostly case books for use of first-year students (R. 21-22). However, the students at the proposed law school for Negroes had access only to the law library in the state capitol directly across the street, a right in common with all other citizens of the State of Texas (R. 45). A library of approximately 10,000 volumes had been requisitioned on February 25, 1947 (R. 40) but was not available for use at the time of the opening of the Negro school on March 10 nor at the time of the trial of this case (R. 44). The University of Texas law school had a full-time, qualified and recognized law librarian with two assistants (R. 139). The Negro law

[3] Pictures of the building of the Law School at the University of Texas and the basement quarters of the so-called Negro law school appear in the record at pages 385-387 and 389.

school had neither librarian nor assistant librarians (R. 74, 80, 128).

It was admitted that the library at the state capitol, a typical court library and not a teaching library, was not equal to the one at the University of Texas, and did not meet the standards of the Association of American Law Schools (R. 134, 138, 145). It was also admitted that even if the requisitioned books were actually obtained the library would not then be equal to the library already in existence at the law school of the University of Texas (R. 151).

Faculty

The University of Texas Law School has a faculty consisting of sixteen full-time and three part-time professors (R. 369-371). The proposed faculty for the Negro school was to consist of three professors from the University of Texas who were to teach classes at the Negro school in addition to their regular schedule at the University of Texas (R. 59, 84, 87).[4] The comparative difference in value between full-time and part-time law school professors was freely acknowledged and it was admitted that the proposed "faculty" did not meet the standards of the Association of American Law Schools (R. 59, 91-92).

Student Body

There were approximately eight hundred fifty students at the law school of the University of Texas (R. 76). From the record it appears that all qualified students other than Negroes were admitted. There were no students at the proposed Negro school at the date of opening nor at the time of the trial (R. 162). Although several Negroes had made inquiry concerning the school, none had applied for

[4] It was also shown that offices for the dean and faculty members involved were to remain at the University of Texas (R. 46-47).

admission (R. 162). If petitioner had entered this school he would have been the only student.

The law school of the University of Texas had a moot court, legal aid clinic, law review, a chapter of Order of the Coif, and a scholarship fund (R. 102-105). None of these were present or possible in the proposed Negro law school, and Charles T. McCormick, dean of the two law schools, testified that he did not consider these to be factors material to a legal education but rather, that they were "extraneous matters" (R. 106).

B

The Unreasonableness of Compulsory Racial Segregation in Public Legal Education

Dr. Robert Redfield, Chairman of the Department of Anthropology at the University of Chicago, testified as an expert, that there is no recognizable difference as to capacities between students of different races and that scientific studies had concluded that differences in intellectual capacity or ability to learn have not been shown to exist between Negroes and other students. He testified that as a result of his training and study in his specialized field for some twenty years, it was his opinion that given a similar learning situation with a similar degree of preparation, one student would do as well as the other, on the average, without regard to race or color (R. 192-194).

Dr. Redfield testified further that the main purpose of education is to develop in every citizen, in accordance with the natural capacities of such citizen, the fullest intellectual and moral qualities and the most effective participation in the duties of citizenship (R. 192).

Dean Earl G. Harrison of the University of Pennsylvania Law School, testifying as an expert in the field of

legal education, summed up the purposes of legal education as follows: "The studies that I have reference to have pointed out in general that there are four objectives of law school education. One is, of course, to prepare the practitioner. Second, is to prepare and train law teachers. Third, is to train and prepare men for legal research, and the fourth objective is to train and prepare men and women for public service" (R. 220).

Professor Malcolm Sharp of the law faculty of the University of Chicago testified as an expert in the field of legal education and explained in detail the purposes of legal training for public service giving examples of the benefits to society of Negro lawyers trained for public service in non-segregated law schools (R. 344-346).[5]

The experts on legal education also testified as to the patent inequality between the two law schools and the impossibility of equality between the schools. They agreed that it was absurd to speak of any institution that has one student as a law school (R. 216-217, 349-350). They stressed the need for competition among students of all classes as an absolute necessity for a legal education (R. 218, 344, 347). They testified that moot court, Order of the Coif, scholarship fund, law reviews and legal aid clinics were most important for a well-rounded legal education and that they were "not by any means extraneous" (R. 221, 347).

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[5] "Q. Now, as a result of your studies and your teaching experience, along with your experience in the Association of American Law Schools, would you state briefly the recognized purposes of a law school as of today?

"A. The purpose of a law school is, of course, first; to train for practice of the profession in the familiar way. The second purpose has been becoming more and more important, as all of the leading schools have recognized, training for positions of public service; as lawyers are called on to fill, to a marked extent, administrative agencies, the bench, legislative positions. The schools are paying more and more attention to training for that purpose. Of course, the training of teachers and scholars in the field."

These expert witnesses also testified that a sizeable body of students of all races, classes and walks of life was of major importance to an adequate legal education. They denied that one Negro or a few Negroes at a segregated law school could under any circumstances obtain a legal education equal to that obtained at the University of Texas (R. 227, 343, 344, 347, 350, 351, 352).

Each of the expert witnesses offered by the petitioner testified that compulsory racial segregation in public education not only made it impossible for the Negro to get an education equal to that offered to the students in the other school but was harmful to the segregated Negro students, the students in the other schools, and the community in general (R. 194-196, 198-199, 227, 341).

C

Inequalities Inherent in Segregated School Facilities

The petitioner offered in evidence several reports of governmental agencies, federal and state, showing without exception the inequalities in educational facilities in segregated schools throughout the states where segregated schools are required (R. 248). The petitioner also offered the testimony of Dr. Charles Thompson, documented by recognized governmental reports, showing conclusively that wherever separate schools were maintained under state law for Negro students, these schools were without exception inferior to the schools maintained for students of other racial groups. The comparison was broken down into each category recognized by educators as valid for comparison purposes (R. 228-283).[6] An appendix showing

[6] Dr. Thompson's testimony was admitted into the record but by final order of the District Judge was ordered stricken from the record as being beyond the scope of the pleadings and issues and immaterial and irrelevant (R. 441).

in detail the inequalities in segregated school systems is filed herewith as "Petitioner's Appendix".

Petitioner also offered the testimony of Donald G. Murray who had been admitted to the law school of the University of Maryland as a result of legal action and who was the first Negro to be admitted to a law school in a state where segregation is required in public schools. Objection to this testimony was sustained but the testimony was placed in the record on a bill of exceptions (R. 288). This testimony showed that although dire consequences were predicted by state officials of Maryland if Murray was admitted to the law school, it developed that his admission brought about no untoward results (R. 288-291).

PART TWO

OPINION OF THE COURT BELOW

The Court of Civil Appeals in affirming the judgment of the lower court based its decision on existence of and the validity of the state's policy of segregation and found that "the State at the time of the trial had provided and made available to Relator a course of instruction in law as a first year student, the equivalent or substantial equivalent in its advantages to him of that which the State was then providing in the University of Texas Law School. We are not dealing here with abstractions but with realities" (R. 449). The judgment of the Supreme Court of Texas refusing application for writ of error (R. 446) and order overruling motion for rehearing were made without an opinion (R. 47). The opinions of the trial court are discussed in Part One.

PART THREE

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, section 1257 this being a case involving rights secured under the Fourteenth Amendment. Petitioner's cause is founded upon rights secured by the Constitution of the United States.

PART FOUR

QUESTION PRESENTED

May the State of Texas Consistently With the Requirements of the Fourteenth Amendment Refuse to Admit Petitioner Because of Race and Color to the University of Texas School of Law?

PART FIVE

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I

The courts of Texas, and of many states, while pretending to observe the requirements of equal protection of the laws in educational matters, approve the exclusion of Negroes from adequate public law schools, thus denying to large numbers that equality of educational opportunity which is the very foundation of democracy. The courts' theory presupposes that the equality guaranteed by the Fourteenth Amendment can be realized in a pattern of compulsory racial segregation in public education. The extent of this practice and the severity of its impact on the community are such as to warrant consideration by this Court.

II

The court below relied on *Plessy* v. *Ferguson*. The inconsistency between the judicial approval of laws imposing racial distinctions in *Plessy* v. *Ferguson* and the judicial disapproval of similar distinctions and classifications in more recent decisions including *Oyama* v. *California*, *Shelley* v. *Kraemer*, *Takahashi* v. *Fish & Game Commission* should lead this Court to review the correctness of the doctrine of *Plessy* v. *Ferguson* and overrule it.[7]

III

This Court should review and reverse the judgment below to prevent the several states from being free to restrict Negroes to public educational facilities clearly inferior to those provided for all other persons similarly situated through the device of arbitrary judicial decision that such discriminatory action provides "substantial equality".

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the court below, should be granted.

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[7] *Plessy* v. *Ferguson*, 163 U. S. 537; *Oyama* v. *California*, 332 U. S. 633; *Shelley* v. *Kraemer*, 334 U. S. 1; *Takahashi* v. *Fish and Game Commission*, 332 U. S. 410. As to this Court's disapproval of unreasonable classifications generally, see, for example, *Colgate* v. *Harvey*, 296 U. S. 404.

IN THE

Supreme Court of the United States

October Term, 1948

No.

HEMAN MARION SWEATT,
Petitioner,
vs.
THEOPHILIS SHICKEL PAINTER, *et al.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Opinion of the Court Below

The opinion of the Court of Civil Appeals can be found at page 445 of this record, and that of the District Court of Travis County is reported at page 438.

Jurisdiction

Jurisdiction of this Court rests upon Title 28, United States Code, Section 1257. The District Court of Travis County entered judgment for respondents on June 17, 1947.

Judgment was affirmed by Court of Civil Appeals, February 25, 1948. Application for writ of error was refused by Supreme Court of Texas on September 29, 1948 (R. 466). Motion for rehearing was overruled on October 27, 1948 (R. 471). On January 12, 1948 this Court extended the time for filing this petition for writ of certiorari until March 23, 1949 (R. 472).

Statement of the Case

Pertinent facts involved in this case are set out in the petition itself, and therefore, are not restated here.

Errors Relied Upon

The Court erred in refusing to consider evidence showing discriminatory features inherent in enforced racial separation at the professional school level.

The Court erred in predicating its decision upon *Plessy v. Ferguson* and in disregarding principles serving the basis for more recent decisions of this Court in conflict with the rationale of that case.

The Court erred in refusing to hold that the racial classification here complained of was arbitrary and unreasonable within the meaning of the Fourteenth Amendment.

The Court erred in finding that the law school for Negroes at Austin was the "equivalent or substantial equivalent of the law school of University of Texas".

The Court erred in finding that the constitutional and statutory provisions of the State of Texas requiring segregation in public education were consistent with the requirements of the Fourteenth Amendment.

ARGUMENT

I

The question whether a state which undertakes to provide legal education for any of its citizens can satisfy the requirements of the equal protection clause of the Fourteenth Amendment by establishing a law school for Negroes separate from the law school it provides for all other persons is of great public importance and should be decided by this Court in this case.

The education of the youth of our nation, formerly the responsibility of the parent, has now become a recognized function of government. This has become a matter of national importance. The individual states have provided public education through the graduate and professional school levels. Most of the states provide educational facilities without regard to the race or creed of the student. However, seventeen of the states have insisted upon either the complete exclusion or the segregation of Negroes in public education.[1] The record of these states has brought down the national level of education. The question of the legality of such racial segregation, which amounts to actual exclusion from the regular recognized state university, is of great public importance.

The seventeen southern states where a pattern of educational segregation is sanctioned and enforced by state law comprise the area of our country which is least able to afford either the financial or the educational hazards created by a dual system of education. The burden on the treasury in maintaining a dual system of education cannot help but

[1] Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia.

be reflected in a deprivation of educational opportunities and facilities for all groups.

The impact of this policy of segregation is felt not only by the minority group, but the nation as a whole. In the most critical period of June-July, 1943, when the nation was crying for manpower, 34.5% of the rejections of Negroes from the armed forces were for educational deficiency. Only 8% of the white selectees rejected for military service failed to meet the educational standards.[2]

The official War Department report on the utilization of Negro manpower in the postwar Army says that "in the placement of men who were accepted, the Army encountered considerable difficulty. Leadership qualities had not been developed among the Negroes, due principally to environment and lack of opportunity. These factors had also affected development in the various skills and crafts."[3]

Recognizing that segregation constitutes a menace to American freedom and was indefensible, the President's Committee on Civil Rights unequivocally recommended its elimination from American life.[4] In the same year, the

[2] *The Black and White of Rejections for Military Service*, Montgomery, Ala., American Teachers Association, 1944, p. 5.

[3] Report of Board of Officers on Utilization of Negro Manpower in the Post-War Army (February, 1946), p. 2.

[4] "To Secure These Rights", *The Report of the President's Committee on Civil Rights*, U. S. Government Printing Office, 1947, p. 166. "The separate but equal doctrine has failed in three important respects. First, it is inconsistent with the fundamental equalitarianism of the American way of life in that it marks groups with the brand of inferior status. Secondly, where it has been followed, the results have been separate and unequal facilities for minority peoples. Finally, it has kept people apart despite incontrovertible evidence that an environment favorable to civil rights is fostered whenever groups are permitted to live and work together. There is no adequate defense of segregation." *Ibid.*

President's Commission on Higher Education, in its report on education in the United States said:[5]

> "The time has come to make public education at all levels equally accessible to all, without regard to race, creed, sex or national origin."

This, too, is the almost unanimous conclusion of scholars and students who have studied the problem.

The professional skills developed through graduate training are among the most important elements of our society. Their importance is so great as to be almost self-evident. Teachers pass on skills and knowledge from one generation to another. Engineers create and service the technology that has been bringing more and more good to more and more people. Doctors and dentists guard the health of their people. Lawyers guide their relationships in a complicated society.

Racial inequality in education has resulted in a loss to the nation of the development of these professional skills in a great part of our population. Because of the limited opportunities open to Negroes in professional education, in the United States in 1940, there was one white physician for every 735 white citizens, but only one Negro doctor for every 3,651 Negroes.[6] And one white lawyer served 670 whites, but there was only one colored lawyer for every 12,230 Negro citizens.[7] In the petitioner's native state of Texas, the same deprivation of professional services exists. In 1940 in Texas, one white lawyer served 709 whites,

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[5] "Higher Education for American Democracy". *A Report of the President's Commission on Higher Education*. U. S. Government Printing Office: Washington, December, 1947, p. 38.

[6] Journal of Negro Education (1945), Vol. XIV, Fall number, p. 511.

[7] *Ibid*, p. 512.

whereas there was only one Negro lawyer for every 40,191 Negroes.[8]

Perhaps even more important than the barriers which segregation offers to the development of leadership and professional skills is its corrosive effect upon the fundamentals of a democratic society. Neither white nor Negro Americans can maintain complete and full allegiance to the basic tenet upon which our government is founded—"that all men are created equal"—when pupils are being forcibly kept apart in the public schools because of their racial identity.

It is essential for the successful development of our country as a nation of free people that the sympathies and tolerance which we wish practiced in later life be fostered in the classroom. "And since according to our institutions, all classes meet, without distinction, in the performance of civil duties, so should they all meet, without distinction of color, in the school, beginning there those relations of equality which our Constitution and laws promise to all."[9]

Enforced separation in the law school, moreover, is particularly pernicious because of the vital importance which the lawyer maintains in our society. Law is "a public profession charged with inescapable social responsibilities."[10] The prime purpose of legal training must be not merely, as Mr. Justice HOLMES has said, "to make men smart, but to

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[8] *Based on data in Sixteenth Census of the United States*: Population, Vol. III, Part 4, Reports by States (1940).

[9] Argument of Charles Sumner, Esq., Against the Constitutionality of Colored Schools in the case of *Sarah C. Roberts v. Boston*, 1849, pp. 29-30.

[10] Simpson, "The Function of a University Law School", 49 Harv. L. Rev. 1068, 1072.

make them wiser in their calling",[11] and "to train men for public service."[12]

The testimony of the expert witnesses in legal education called by the petitioner[13] is amply supported by other experts. Eminent authorities in the field of legal education have demonstrated that there are certain features of a law school which are necessary to a proper legal education which can only be found in a full-time, accredited law school.[14] Some of these are: a full-time faculty,[15] a varied and inclusive curriculum,[16] an adequate library, well-equipped building and several classrooms,[17] a well-established, recognized law review and a moot court.[18]

Equally essential to a proper legal education in a democratic society is the inter-change of ideas and attitudes which can only be effected when the student-body is representative of all groups and peoples. Exclusion of any one

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[11] Holmes, "The Use of Law Schools" in Collected Legal Papers (1920), pp. 39-40.

[12] Malcolm Sharp, testimony at p. 341 in Record. See also McCormick, "The Place and Future of the State University Law School," 24 N. C. L. Rev. 441, "As we rebuild our curricula, it seems that more attention should be given to the knowledge that a lawyer needs in order to be a community leader—such matters as planning, zoning, and housing come to mind—and to the adaptation of the public law courses not only to the needs of the lawyer serving private clients, but to the requirements of graduates who will enter the service of the state and national governments."

[13] The testimony of these witnesses is summarized in the petition at pages 9 to 11.

[14] See Boyer, "Smaller Law Schools: Factors Affecting Their Methods and Objectives," 20 Oregon Law Rev. 281 (1941).

[15] *Ibid.*

[16] *Ibid.*

[17] Townes, "Organization and Operation of a Law School," 2 Am. Law School Rev. 436 (1910); Ballantine, "The Place in Legal Education of Evening & Correspondence Law Schools," 4 Am. Law School Review 369 (1918).

[18] See Boyer, "Smaller Law Schools: Factors Affecting Their Methods and Objectives," 20 Oregon Law Rev. 281 (1941).

group on the basis of race, automatically imputes a badge of inferiority to the excluded group—an inferiority which has no basis in fact.[19] The role of the lawyer, moreover, is often that of a law-maker, a "social mechanic", and a "social inventor."[20] A profession which produces future legislators and social inventors to whom will fall the social responsibilities of our society, can not do so on a segregated basis.[21]

It is evident that even if it were possible to construct a law school building for Negroes equal in all respects to the one now in existence at the University of Texas with a library equal in all respects, with a faculty of equal number and equal ability (if possible), the separate law school could not meet the recognized requirements set out above. Actually, in so far as legal education is concerned, an equal education is impossible in a jim-crow law school.

Even apart from this, it is absurd to speak of a school with only one student as a law school. In the field of legal education, even more so than in other fields of public education, the blind adherence to the practice of compulsory racial segregation not only deprives the individuals involved of the equality of law, but deprives the state and the nation of properly trained specialists necessary to our government.

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[19] "The Black and White of Rejections for Military Service," American Teachers Association, August, 1944, page 29; Otto Klineberg, "Negro Intelligence and Selective Migration," New York, 1935; J. Peterson & L. H. Lanier, "Studies in the Comparative Abilities of Whites and Negroes," *Mental Measurement Monograph*, 1929.

[20] Simpson, "The Function of a University Law School," 49 Harv. L. Rev. 1068, 1072. See also McCormick, "The Place and Future of the State University Law School," 24 N. C. L. Rev. 441.

[21] Simpson, op. cit., p. 1069. See also Stone, "The Public Influence of the Bar," 48 Harv. L. Rev. 1.

II

The inconsistency between the judicial approval of laws imposing racial distinctions in *Plessy* v. *Ferguson* and the judicial disapproval of similar distinctions and classifications in more recent decisions should lead this Court to review and disavow the doctrine of *Plessy* v. *Ferguson*.

In upholding the denial of petitioner's application for a writ of mandamus, the Court of Civil Appeals said: "The validity of state laws which require segregation of races in state-supported schools, as being, on the ground of segregation alone, a denial of due process, is not now an open question. The ultimate repository of authority to construe the Federal Constitution is the Federal Supreme Court. We cite chronologically, in a note below, the unbroken line of decisions of that tribunal recognizing or upholding the validity of such segregation as against such attack." In support of this proposition, *Hall* v. *DeCuir*, 95 U. S. 485; *Plessy* v. *Ferguson*, 163 U. S. 537; *Cummings* v. *County Board of Education*, 175 U. S. 528; *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151; *Gong Lum* v. *Rice*, 275 U. S. 78; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631 were cited.

Plessy v. *Ferguson* raised in this Court for the first time the question of the constitutionality of a state statute enforcing segregation based upon race and color. In that case, a Louisiana statute requiring the separation of Negro and white passengers was held to be consistent with the equal protection clause of the Fourteenth Amendment. Yet the opinion appears to rely heavily upon the leading state case in this field—and the only one of the cited cases dis-

cussed in the majority opinion[22]—*Roberts* v. *Boston*, 5 Cush. (Mass.) 198 (1849), decided almost twenty years before the adoption of the Fourteenth Amendment. Yet, it was the very diversity of opinion, so pronounced in 1849, on the reasonableness of legal distinctions based on race which the Fourteenth Amendment sought to settle. Antebellum justifications of segregation have no more logical place in the interpretation of the Fourteenth Amendment than antebellum notions of voting restrictions have in defining the scope and meaning of the Fifteenth Amendment.

In addition, *Plessy* v. *Ferguson* was decided upon pleadings which assumed a theoretical equality within segregation rather than on a full hearing and evidence which would have revealed equality to be impossible under a system of segregation.

An examination of the other decisions of this Court upon which the lower court relied shows that the doctrine of *Plessy* v. *Ferguson* has not been reexamined nor seriously challenged.

In *Cummings* v. *Board of Education*, *supra*, the issue of the validity of the segregation statute was not even raised. In fact plaintiffs there acquiesced in the use of taxes levied to support segregated schools at the elementary and intermediate grammar school levels. The main purpose of the suit was to secure an injunction forcing the discontinuance of a high school for whites since no school was being maintained for Negroes. This remedy the Court considered improper.

In *Gong Lum* v. *Rice*, *supra*, again the question was not raised. The primary issue there was whether a Chinese

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[22] Other cases cited in the opinion include: *People* v. *Gallagher*, 93 N. Y. 438; and *Ward* v. *Flood*, 48 Cal. 36; *State, Garnes* v. *McCann*, 21 Ohio. St. 210; *Lehew* v. *Brummell*, 103 Mo. 546; *Cory* v. *Carter*, 48 Ind. 337; *Dawson* v. *Lee*, 83 Ky. 49.

could be excluded from the white schools under the segregation statutes of Mississippi, and could be classified as a colored person and required to attend the Negro school.[23]

In the *Gaines* case, *supra*, although the doctrine of *Plessy* v. *Ferguson* was repeated, it was neither examined nor applied. There the main issue before the Court was whether a qualified Negro applicant could be excluded from the only state supported law school. The Court decided that question in the negative.

In *Sipuel* v. *Board of Regents*, *supra*, the doctrine of *Plessy* v. *Ferguson* was neither raised, examined, repeated nor applied. The Court specifically stated that the appellant was entitled to receive educational benefits at the same time and as soon as it was offered to applicants of any other group. Moreover in *Fisher* v. *Hurst*, 333 U. S. 147, the same case, *supra*, this Court was asked to issue an original petition for a writ of mandamus to compel compliance with its mandate there. The Court denied the writ on the grounds that the original *Sipuel* case had specifically not raised the issue of the validity of the segregation statutes and that procedurally the question could not be considered on the petition for writ of mandamus.

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[23] It is true that Mr. Chief Justice TAFT, op. cit., supra, at page 85 in discussing the issue said: "Were this a new question it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the State Legislature to settle without intervention of the Federal Courts under the Federal Constitution." Therefore, even if this decision is construed as raising the issue of the validity of school segregation statutes, it is clear that the doctrine was not examined and that *Plessy* v. *Ferguson* was relied upon without question.

This is the group of cases upon which the separate but equal doctrine under the Fourteenth Amendment is said to depend.[24] The inconsistencies between the "separate but equal" doctrine of *Plessy* v. *Ferguson* and the reasoning and holdings of a considerable body of decisions of this Court become readily apparent when analysis is made in terms of the fundamental question, common to all, whether racial differences can be made the bases for legislative distinctions in the face of the Fourteenth Amendment. Except in *Plessy* v. *Ferguson, supra*, and the decisions which rely uncritically upon it, this Court has consistently concluded that the Fourteenth Amendment prohibits the states from making racial differences and other arbitrary distinctions the bases for general classifications. This impressive and carefully considered group of cases includes: *Takahashi* v. *Fish & Game Commission*, 332 U. S. 410, 420 L. ed. 1096, 1101; *Oyama* v. *California*, 332 U. S. 633, 640, 646; *Shelley* v. *Kraemer*, 334 U. S. 1, 20, 23; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, 374; *Buchanan* v. *Warley*, 245 U. S. 60, 82; *Hill* v. *Texas*, 316 U. S. 400, 404; *Strauder* v. *West Virginia*, 100 U. S. 303, 307, 308; *Truax* v. *Raich*, 239 U. S. 33, 41, 42;

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[24] Another case in point but not relied upon by the court below is *Berea College* v. *Kentucky*, 211 U. S. 45. That case appears to accept the doctrine insofar as the power of the state to place conditions on a corporate charter. *Hall* v. *DeCuir, supra; McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151; *Mitchell* v. *United States*, 313 U. S. 80 were decided under the Commerce Clause of the Federal Constitution and need not be considered in a decision as to the validity of the equal but separate doctrine within the meaning of the Fourteenth Amendment. The foundation of even those cases, however, seems to have been shaken. Compare *Morgan* v. *Virginia*, 328 U. S. 373; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28.

Virginia v. *Rieves*, 100 U. S. 313, 322; *Ex Parte Virginia*, 100 U. S. 339, 344, 345.[25]

These cases merely apply to racial distinctions the general constitutional principle applicable in all other areas. Their rationale is merely a part of and consistent with the basic principle that all governmental classifications must be based upon a significant difference having a reasonable relationship to the subject matter of the statute. *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417; *Gulf Colorado & Sante Fe Railway Co.* v. *Ellis*, 165 U. S. 150, 155; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559, 560; *Atchison Topeka & Santa Fe Railway Co.* v. *Vosburg*, 238 U. S. 56, 60, 61; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 416, 417; *Smith* v. *Cahoon*, 283 U. S. 553, 566, 567; *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U. S. 459, 462, 463; *Colgate* v. *Harvey*, 296 U. S. 404, 422, 423; *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266, 274; *Skinner* v. *Oklahoma*, 316 U. S. 535, 541, 542; *Louisville Gas & Electric Co.* v. *Cohen*, 277 U. S. 32, 37; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 400; *Powers Mfg. Co.* v. *Saunders*, 274 U. S. 490, 493; *Truax* v. *Corrigan*, 257 U. S. 312, 337; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 106, 107.

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[25] *Takahashi* v. *Fish & Game Commission*; *Yick Wo* v. *Hopkins* and *Truax* v. *Raich* involved the right to engage in a useful occupation. *Oyama* v. *California*, *Shelley* v. *Kraemer* and *Buchanan* v. *Warley* involved the right to own, occupy, sell and lease real property. *Hill* v. *Texas*, *Strauder* v. *West Virginia*, *Virginia* v. *Rieves* and *Ex Parte Virginia*, involved the right of Negroes to be free of discrimination in the selection and composition of grand and petit juries.

Despite the different problems involved, the Court made the same fundamental approach to each case. Underlying each decision is the basic proposition that race alone cannot be a valid criterion upon which to sustain governmental action under the 14th Amendment. Finding on examination that the real purpose and effect of the state's action was racial discrimination, no difficulty was encountered in declaring the action unconstitutional.

Neither the decision nor the rationale of *Plessy* v. *Ferguson* can be reconciled with this impressive body of authorities.

The Court below in relying on *Plessy* v. *Ferguson* and in ignoring this body of cases has improperly and mistakenly construed the limitations of the Fourteenth Amendment as applied to the instant case. For not only is *Plessy* v. *Ferguson* inconsistent with many decisions of this Court, but it was wrongly decided. In sustaining a statute based upon a difference in the color of citizens, this Court made a radical departure from the body of cases, cited *supra*, under which such a distinction would have necessarily been construed as arbitrary and therefore unlawful. In requiring that a classification be based upon a significant difference having a reasonable relationship to the subject matter of the statute, that body of decisions rests upon a sound foundation. The same principle should be controlling in the instant case. Any other approach makes the equal protection clause meaningless. Insofar as *Plessy* v. *Ferguson* affects the application of that principle to the instant case, it should not be followed.

III

This Court should review and reverse the judgment below to prevent the several states from being free to restrict Negroes to public educational facilities clearly inferior to those provided for all other persons similarly situated through the device of arbitrary judicial decision that such discriminatory action provides "substantial equality".

Texas and sixteen other states have insisted that public education can only be furnished on a basis of racial distinc-

tion between students. The purpose of this practice is to exclude Negroes from the recognized state educational institutions. The record in this case, as in other cases, will demonstrate that these states first establish facilities for non-Negroes. Later, either as a result of legal action or other compulsion, separate institutions have been established for Negroes.

The record in this case, the record in similar cases, governmental and private studies, demonstrate clearly that the separate Negro facilities are never equal to the facilities established for other groups. In short, we have been unable to find a single recognized study of public education on a segregated basis which reveals equality of opportunity as between the segregated and now segregated schools. The Negro school is invariably an inferior school.

The "separate but equal" doctrine of *Plessy* v. *Ferguson*, relied upon by Texas and the other southern states is based on the hypothesis that equal facilities can be realized in a segregated school system. The record in this case and in other cases has demonstrated the invalidity of such a hypothesis. It is clear not only that the doctrine of "separate but equal" has not produced equality, but can never provide the equality required by the Fourteenth Amendment.

This separate but equal doctrine has brought about constant and continual litigation. Negroes have gone to the courts in Missouri,[26] South Carolina,[27] Tennessee,[28] Louisi-

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[26] *Missouri, ex rel. Gaines* v. *Canada, supra; Bluford* v. *Canada*, 32 F. Supp. 707 (1940) (Appeal dismissed 119 F. (2d) 779 (C. C. A. 8th)).

[27] *Wrighten* v. *Board of Trustees*, 72 F. Supp. 948.

[28] *State, ex rel. Michael* v. *Whitham*, 179 Tenn. 250, 165 S. W. (2d) 378 (1942).

ana,[29] Oklahoma;[30] Maryland,[31] Kentucky,[32] and Texas in order to secure educational advantages equal to those being offered to all other qualified persons. The formula constantly invites such court action. In all instances this has meant loss of time and years out of an individual's career, while his case pursues its way through the courts. This very fact shows the weakness of the doctrine.

The states are more interested in maintaining segregation than in affording equality. Hence the separate but equal doctrine has now become the "separate but substantially equivalent" doctrine. The record in this case is a clear example of the circuitous route forced upon a Negro litigant seeking only to enforce a right recognized as belonging to every other qualified applicant except those who happen to be Negroes.

Petitioner in this case applied for admission to the existing state law school on February 26, 1946. All qualified students other than Negroes who applied at the same time and who successfully passed their examinations are now either practicing law or are ready to take the bar examination for that purpose. On the other hand, the petitioner, solely because of his race and color, after long, extended and involved litigation is still without a legal education.

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[29] *Louisiana, ex rel. Hatfield* v. *Louisiana State University* (File 25,520, State Court for the 19th Judicial District).

[30] *Sipuel* v. *Board of Regents, supra; Fisher* v. *Hurst, supra; McLaurin* v. *Oklahoma State Regents*, No. 614, U. S. Supreme Court, Oct. Term, 1948.

[31] *Pearson* v. *Murray*, 169 Md. 478, 182 Atl. 590 (1936).

[32] *Johnson* v. *Board of Trustees* (File No. 625, U. S. Dist. Court for the Eastern Dist. of Kentucky).

At the first hearing in this case, although the trial court concluded that petitioner had been denied rights guaranteed by the Constitution, nevertheless, because of the separate but equal doctrine, it refused to issue the order for the necessary relief and allowed the state six months in which to set up the facility separate from that in existence at the University of Texas. At the end of the six months' period the trial court again reverted to the separate but equal doctrine and found that petitioner had been given substantially equivalent educational opportunities to that afforded to whites at the University of Texas on the mere promise of the state to establish a law school for Negroes in Houston.

At the third hearing, this same court in the face of petitioner's testimony which conclusively established that the facilities in the basement law school at Austin, faculty, library and in all respects were in no way equal or substantially equivalent to the law school at the University of Texas found that this makeshift school established over night in a basement of a building afforded to petitioner "equal if not better opportunities for the study of law," than he could obtain at the University of Texas.

The Court of Civil Appeals in the face of this clear evidence showing that the Negro school was inferior to the white school agreed with the petitioner that there could be no substantial equality, the two words being incompatible in themselves, but said the Court:

> "This is of course true in pure, as distinguished from applied, mathematics. 'Equality' like all abstract nouns must be defined and construed according to the context or setting in which it is employed. Pure mathematics deals with abstract relations, predicated upon units of value which it defines or assumes as equal. Its equations are therefore exact. But in this sense there are no equations in nature;

> at least not demonstrably so. Equations in nature are manifestly only approximations (working hypotheses); their accuracy depending upon a proper evaluation of their units or standards of value as applied to the subject matter involved and the objectives in view. It is in this sense that the decisions upholding the power of segregation in public schools as not violative of the fourteenth amendment, employ the expressions 'equal' and 'substantially equal' and as synonymous" (R. 449).

The most authoritative studies made on public education in the United States clearly indicate that the Negro institutions are vastly inferior to the whites. Yet when faced with the necessity of holding Negro institutions to be inferior to the white and therefore to order the admission of the Negro to the white institution, courts have fallen back on the formula "substantially equivalent" to justify their decision to refuse the admission of the Negro into the white institution.

If it were not for the constitutional and statutory provisions requiring segregation in public education in Texas, there could be little doubt that the lower courts would have ordered the admission of the petitioner. If it were not for the existence of the "separate but equal" doctrine, the lower courts would have had no difficulty in declaring that said constitutional and statutory provisions were unreasonable classifications and therefore unlawful. But for the "separate but equal doctrine", the Texas courts would not have been able to justify the Negro law school as "substantially equivalent" and would have declared the constitutional and statutory provisions to be unreasonable classifications in violation of the Fourteenth Amendment.

Therefore, the only way for the petitioner in this case and other qualified Negroes to obtain a legal education equal

to that obtained by all other qualified applicants is by admission to the recognized state institutions. The only way this can be accomplished is for this Court to reconsider the doctrine of *Plessy* v. *Ferguson* and overrule it.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the court below, should be granted.

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IN THE

Supreme Court of the United States

October Term, ~~1948~~ '47

No. ~~662~~ 44

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *ET AL.*

APPENDIX TO PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF TEXAS

APPENDIX

The following data constitute a portion of a comprehensive and definitive study which demonstrates the type, quality, and quantity of the educational facilities available under the "separate but equal" formula.

The source material for this study is based upon publications of the United States Department of Education, publications of other government agencies and bodies, as well as articles which have appeared in accredited journals of education.

This portion of the study, which emphasizes the educational inequalities on the higher and professional levels, is filed to give this Court a true picture of "separate but equal" education.

In the seventeen southern states and the District of Columbia, separate schools are mandatory under law. Of the remaining thirty-one states, in all but a few segregated schools are not legal or are actually illegal.[1]

Approximately ten million or 77% of all Negroes in the United States live in the southern region, admittedly the most economically backward section of the country. This backwardness is overwhelmingly due to the maintenance of segregation and a caste system which relegates all Negroes to a position lower than the lowest white. The adamant stand which the South has taken against the training and utilization of 22.3% of its human resources, by depriving

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[1] Reddick, L.D. "The Education of Negroes in States Where Separate Schools Are Not Legal," *The Journal of Negro Education*, Summer 1947, Vol. XVI, No. 3, p. 296. The seventeen states requiring segregation are: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, and the District of Columbia.

its Negro citizens of a fair and equal share of one of the basic democratic rights—the right to a good education—means that this right is denied to the very people it seeks to protect. As President Truman's Commission on Higher Education has phrased it:[2]

> Segregation lessens the quality of education for the whites as well. To maintain two school systems side by side—duplicating even inadequately the buildings, equipment, and teaching personnel—means that neither can be of the quality that would be possible if all the available resources were devoted to one system, especially not when the States least able financially to support an adequate educational program for their youth are the very ones that are trying to carry a double load.

Thus every southerner suffers from lowered educational standards, Negroes most severely. Every southerner suffers because the maintenance of this dual system demands that a large percentage of state tax-monies be diverted away from other fields where it is vitally needed and where it rightfully belongs. And subsequently the whole nation suffers because it is bereft of potential talent left undeveloped.[3]

Although educational inequities result from segregated education on every level, it is in the field of higher education that the results are most easily viewed.

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[2] *Higher Education for American Democracy,* Report of the President's Commission on Higher Education, Government Printing Office, Washington, D. C., 1947, Vol. I, p. 34.

[3] "We believe that federal funds, supplied by taxpayers all over the nation, must not be used to support or perpetuate the pattern of segregation in education, public housing, public health services, or other public services and facilities generally . . . it believes that segregation is wrong morally and practically and must not receive financial support by the whole people." *To Secure These Rights,* recommendation V of the President's Committee on Civil Rights, p. 166.

Higher Education

The amount and the degree of opportunity, and the extent to which facilities for higher education are available, are probably the best indices to the educational environment of an area. They reflect the value that the community places in the education and the maximum achievement of its people, as well as indicating the general economic and social conditions of the community itself.

In the 17 states and the District of Columbia, there are 530 institutions of higher learning for whites, 192 public colleges and universities supported by state and federal funds included. Institutions for Negroes number 104 including 39 supported by public funds.[4] Whereas Negroes are 22.3% of the southern population, they have but 16.4% of the total number of institutions providing higher education in the southern region. More indicative, they have but 16.9% of those supported at public expense, although their need is proportionately greater. Their proper* share (22.3%) would entail providing 48 more colleges and universities, 16 to be supported as public institutions.

What does this mean in terms of manpower? 1947 saw an unprecedented enrollment in colleges and universities throughout the country with a total of 2,338,226 students attending classes. 683,235 of these students were enrolled in southern institutions, making a ratio of students to population of 1:66.5 for the region.[5]

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[4] *Educational Directory*, Part 3, "Colleges and Universities," U. S. Office of Education, Washington, 1947.

* By "proper share" we are in no way suggesting a quota, but are using the population as a means of measuring the adequacy and inadequacy of facilities and provisions made for the education of Negro citizens.

[5] *1947 Fall Enrollment in Higher Educational Institutions*, U. S. Office of Education, November 10, 1947 (Circular No. 238).

Enrolled in institutions supported at public expense were 57.9% of the white students in the South and 54.3% of the Negro students, while Negroes were only 10.3% of the total benefiting from these public facilities. Furthermore, only 5.5% of all expenditures for public institutions in the South were for Negro colleges and universities.[6] The percent of Negro students in public institutions should have been more than doubled and expenditures quadrupled were they receiving benefits equal to those extended to white students.[7]

Further examination of the data reveals that there are more institutions both public and private (except in Delaware) for the use of whites than for Negroes, and which are consequently more geographically spaced, thereby making the facilities more readily accessible.

A comparison of the South with the rest of the country shows further what the duplicated facilities of segregation mean. Whereas the South maintains more universities and colleges per 1,000 population than the rest of the nation, its ability to support them is far less. It may be noted that even with more institutions, a smaller percentage of the South's population as compared with the rest of the country had in 1940 completed four or more years of college. In 1947, there was one student in a southern college or university for every 66.5 persons in the South, while in the North and West there was one student for every 52 persons in the population.

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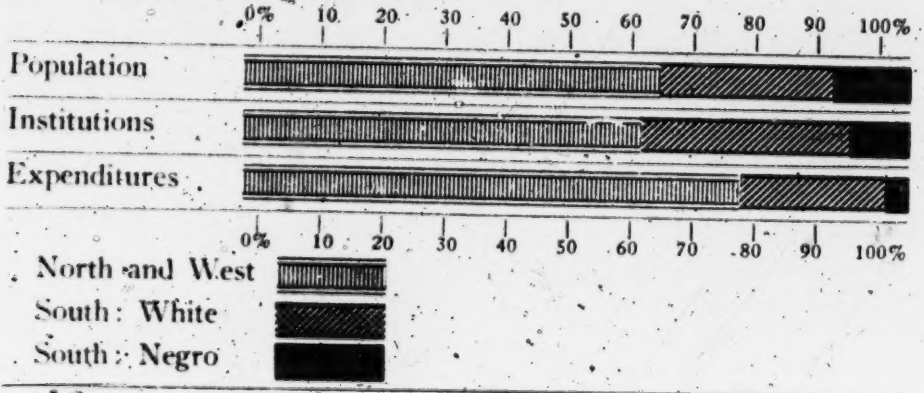
[6] Mordecai W. Johnson, Hearings Before Subcommittee on Appropriations, House of Representatives, 80th Congress, February 24, 1947, p. 145.

[7] It is interesting to note that the enrollment in New York University in the fall semester of 1947 was 46,312. This is a larger student body than the *total* enrollments in 15 of the individual southern states and the District of Columbia. Only Missouri and Texas had larger state-wide enrollments than that for this single Northern university. In this connection, it should also be borne in mind that the great majority of northern Negroes find it necessary, in the face of restrictive quotas, to go South for their college education.

We have already indicated the general state of education prevailing in the southern states. The following data constitute a specific and graphic demonstration of the inequities in segregated education.[7]

1. Southern Negroes are 7.7% of the total United States population, yet they have only 6.1% of all institutions of higher education in the country. Southern whites are 26.7% of the total population, yet they have 31.2% of all the colleges and universities in the country.
2. The South spends 22.3% of all money expended for higher education in the country, yet Negroes get only 1.8% of this money, while southern whites get 20.5%.
3. The average expenditure for southern universities and colleges (even including the Negro institutions) is *over twice* the amount spent for the average Negro institution. Whereas $4.28 is spent per capita white, only $1.32 is spent per capita Negro population.*
4. In only 3 states and the District of Columbia does the number of Negroes enrolled in publicly supported institutions constitute a reasonable percentage of all students benefiting from such educational provisions in anything like what their proportion in the population warrants.

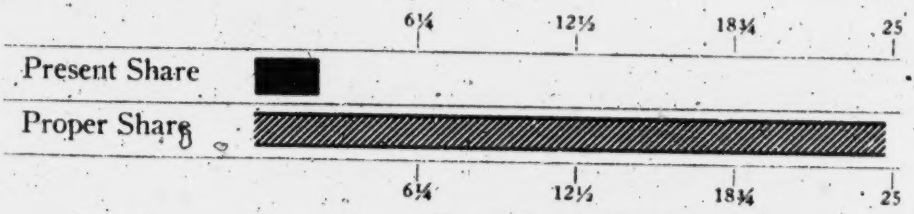


[7] Sources:

The Educational Directory, 1946-47, III, p. 7.
16th Census: 1940, Population, 2nd Series, U. S. Summary, p. 47.
The Journal of Negro Education, Summer 1947, p. 468.
Statistics of Higher Education, 1943-44, p. 70.

* For further data see Charts at the end of Appendix.

It might be asked just how the South manages to support this dual system of education? The answer is self-evident: by means of segregation which has resulted in the practice of extensive discrimination as the above charts indicate. For example, if expenditures in the public institutions for Negroes were equalized on a per capita population basis, an additional $19,000,000 would have to be spent for higher education alone. This would raise the present total expenditures 463%.



(in millions of dollars)

Expenditures for Educational Purposes in Public and Private Colleges and Universities in the 17 States and the District of Columbia: 1943-44.[9]

	White Institutions	*Negro Institutions*
Expenditures:		
Total	$150,622,000	$13,438,000
Private	65,033,000	8,149,000*
Public	85,591,000	5,289,000
% of all money expended:		
Total	91.8%	8.2%
Private	88.9%	11.1%
Public	94.2%	5.8%
Expenditure per student—		
Total	$479.46	$393.16
Expenditure per capita population:		
Total	$4.28	$1.32
Public	2.42	.52
College Enrollment:		
Total	90%	10%

* Negro private institutions carried about a 50% heavier lead in terms of expenditures than did private institutions for whites.

[9] Adapted from Jenkins, Martin D., "The Availability of Higher Education for Negroes in the Southern States," *The Journal of Negro Education*, Op. Cit., pp. 466.

At present, the situation is such that Negro private institutions must carry an undue burden in the attempt to furnish educational facilities and opportunities to those who would otherwise be deprived of advanced training. This process will continue until such time as the southern states realize that the "equal but separate doctrine" is economically, and more important, educationally unsound.

The following excerpt from the testimony offered by Dr. Mordecai W. Johnson, President of Howard University, speaks for itself:[10]

> In states which maintain the segregated system of education there are about $137,000,000 annually spent on higher education. Of this sum $126,541,795 (including $86,000,000 of public funds) is spent on institutions for white youth only; from these institutions Negroes are rigidly excluded. Only $10,500,000 touches Negroes in any way; in fact, as far as state supported schools are concerned, less than $5,000,000 directly touches Negroes. . . . The amount of money spent on higher education by the state and federal government for Negroes within these states is less than the budget of the University of Louisiana (in fact only sixty-five per cent of the budget), which is maintained for a little over 1,000,000 people in Louisiana. That is one index; but the most serious index is this: that this little money is spread over so wide an area and in such a way that in no one of these states is there anything approaching a first-class university opportunity available to Negroes.

In the face of such facts, the amount of money expended for education assumes extreme importance, becomes, indeed, so basic to the quality of said education in terms of faculty, physical plant, educational equipment and curricular scope, that it renders one as unwilling as he is unable to credit the

[10] Johnson, Dr. Mordecai W., Hearings Before Subcommittee on Appropriations, House of Representatives, 80th Congress, February 24, 1947.

claim made by the southern states that their separate schools are equal in all respects to those furnished for whites.

On the Graduate Level

A well-known educator recently wrote:[12] "The provision of higher and professional educational opportunities for Negroes is relatively little better today than fifteen years ago." This statement is even more graphic when viewed contextually: it is mainly within the last fifteen years that higher and professional education and training have assumed their broad importance. In the present day and age of specialization and demand for technical skills, there is no institution in the South where a Negro may pursue work leading to a doctorate. The opportunities for whites are vastly different: doctorates are offered in a public institution in each of the 17 states as well as in a private institution in 12 states and the District of Columbia.

> There are two accredited schools of medicine for Negroes in the South, *but* there are twenty-nine for whites.
>
> There are two accredited schools of pharmacy for Negroes in the South, *but* there are twenty for whites.
>
> There are two (one provisionally accredited) schools of law for Negroes in the South, *but* there are *forty* for whites.
>
> There is no accredited school of engineering for Negroes in the South, *but* there are thirty-six for whites.

The chart on the following page demonstrates these facts graphically.[13]

---

[12] Thompson, Charles H., *The Journal of Negro Education*, Howard University Press, Fall Issue, 1945, Vol. XIV, p. 267.

[13] *Educational Directory, 1946-7.* The quote is from *Higher Education for American Democracy*, Vol. I, p. 36, Op. Cit.

Four Year Institutions Supported at Public Expense, Offering Training in Specified Fields with Departments Accredited by Their Respective Professional Association: 1946-7.[14]

WHITE:	*Law*	*Medicine*	*Dentistry*	*Engineering*	*Pharmacy*
Alabama	1			2	1
Arkansas	1	1		1	
Delaware				1	
D. C.					
Florida	1			1	1
Georgia	1	1		1	1
Kentucky	2	1	1	2	
Louisiana	1	1		1	
Maryland	1	1	1	1	1
Mississippi	1	1		1	1
Missouri	1	1 (2 yr. course)		1	
N. Carolina	1	1 (2 yr. course)		1	1
Oklahoma	1	1		2	1
S. Carolina	1	1		3	2
Tennessee	1	1	1	1	1
Texas	1	1	1*	3	1
Virginia	2	2	1	3	1
West Virginia	1	1 (2 yr. course)		1	1
TOTAL:	18	15	5	26	13

[14] Source: Educational Directory, Part 3, Colleges and Universities, U. S. Office of Education, 1947.

* Provisionally accredited, or accredited with some reservation, or admitted on probation.

NEGRO:

	Law	*Medicine*	*Dentistry*	*Engineering*	*Pharmacy*[14a]
Alabama					
Arkansas					
Delaware					
D. C.	1	1	1		1
Florida					
Georgia					
Kentucky					
Louisiana					1
Maryland					
Mississippi					
Missouri	1*				
N. Carolina					
Oklahoma					
S. Carolina					
Tennessee					
Texas					
Virginia					
West Virginia					
TOTAL:	2	1	1	0	2

[14a] Source: Educational Directory, Part 3, Colleges and Universities, U. S. Office of Education, 1947.

ACCREDITING ASSOCIATIONS:

Law: The American Bar Association

Medicine: The American Medical Association

Dentistry: The Council on Dental Education of the American Dental Association

Engineering: The Engineers' Council for Professional Development

Pharmacy: The American Council on Pharmaceutical Education, Inc.

The paucity of institutions offering opportunities for Negroes to pursue graduate and professional work in the South, coupled with the quota * system of Northern colleges and universities, has resulted in a serious curtailment of the number of highly-skilled Negro physicians, lawyers, engineers, etc. In 1940 there was one skilled Negro and white out of the following number of the South's Negro and white population, respectively:[15]

Profession	*White*	*Negro*
Doctors:	843	4,891
Lawyers:	702	27,730
Dentists: (male)	2,589	13,425
Engineers: (male)	655	142,944
Pharmacists: (male)	1,711	25,246

* The President's Commission on Higher Education comments:

"*The Quota System.* At the college level a different form of discrimination is commonly practiced. Many colleges and universities, especially in their professional schools, maintain a selective quota system for admission, under which the chance to learn, and thereby to become more useful citizens, is denied to certain minorities, particularly to Negroes and Jews.

"This practice is a violation of a major American principle and is contributing to the growing tension in one of the crucial areas of our democracy.

"The quota, or *numerous clausus,* is certainly un-American. . . .

"The quota system denies the basic American belief that intelligence and ability are present in all ethnic groups, that men of all religious and racial origins should have equal opportunity to fit themselves for contributing to the common life.

"Moreover, since the quota system is never applied to all groups in the Nation's population, but only to certain ones, we are forced to conclude that the arguments advanced to justify it are nothing more than rationalizations to cover either convenience or the disposition to discriminate. The quota system cannot be justified on any grounds compatible with democratic principles." *Higher Education for American Democracy,* A Report of the President's Commission on Higher Education, Government Printing Office, Washington, D. C., December, 1947, p. 35.

[15] 16th Census: 1940, *Population, Labor Force.*

These are the results of segregated education. Broken down by individual states, the figures show up in even sharper relief (see Appendix Chart V for this data).

The implications of the figures presented above are extremely serious. The fallacy that Negroes are not desirous or capable of absorbing and utilizing specialized training has often been voiced by people from all parts of our nation. The findings of such sciences as authropology, sociology, and psychology, however, refute these arguments. The fact is that the opportunities for Negroes are too limited and too few, in these and other fields as well. As a southern educator has recently phrased it: "They don't teach us what they blame us for not knowing."[16] That Negroes want the benefits of more and better education is evidenced by recent court cases, by the great increase in enrollments in Negro institutions, and by reports from the schools themselves. Howard University for the present school year stated that the total enrollment was over 7,000. The medical school which can accommodate 70 freshmen had to turn down 1,180 ably qualified applicants. The pharmacy and dentistry schools which can each accommodate 50 had over 700 and 500 applicants, respectively.[17] And Howard, it must be remembered, is the only public institution in the South where Negroes can get professional training in these fields. These conditions would seem to apply to other schools as well.*

However, the case for the extension of equal education for the Negro rests only in part upon his equal educability. The basic social fact is that in a democ-

[16] Quoted in Fred H. Hechinger's column, *The Washington Post*, March 7, 1948.

[17] *The Crisis*, November, 1947, p. 324.

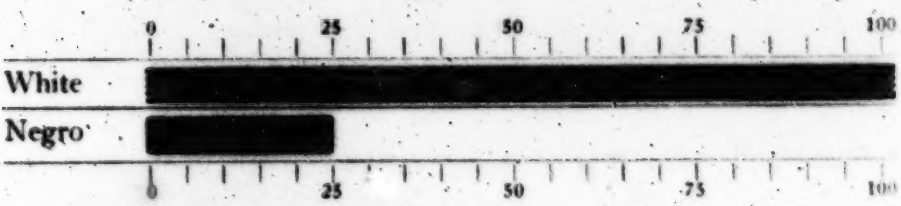
* 85% of all Negro doctors and 90% of all Negro dentists are trained at Howard and Meharry, report Henry and Katherine Pringle, "The Color Line in Medicine," *The Saturday Evening Post*, January 24, 1948.

racy his status as a citizen should assure him equal access to educational opportunity.[18]

EDUCATIONAL OPPORTUNITY

Dr. Charles H. Thompson, Dean of the Howard Graduate School, reviewing the limited number of trained Negro professionals, remarks:[19]

> Whatever other inferences may be drawn from the facts . . . one of the most important and inevitable conclusions is that Negroes in the separate school systems of the 17 states and the District of Columbia which require racial segregation have been the victims of gross discrimination in the provision of educational opportunities. On the whole Negroes have had only about one-fourth the educational opportunity afforded to whites in the same school systems, as indicated by the product turned out.



The following quote demonstrates some of the results of the conditions described above:

> In the 17 states and the District of Columbia the median years of schooling for the white population was 8.4; for Negroes the median was 5.1; with a range for the whites running from 7.9 in Kentucky to 12.1 in the District of Columbia; and for Negroes from 3.9 in Louisiana to 7.6 in the District of Columbia. Some 13.2% of the white population had completed 4 years of high school as compared with only 2.9% of the Negroes; 12.1% of the whites had had some

[18] *Higher Education for American Democracy*, Op. Cit., Vol. II, p. 30.

[19] Thompson, Charles H., *The Journal of Negro Education*, Howard University Press, Vol. XVI, Summer, 1947, p. 265.

college education, as compared with only 2.5% of the Negroes; and 4.7% of the white population had had 4 or more years of college as contrasted with only 1.1% of the Negroes. There were, therefore, 4 times as many whites as Negroes with a high school or college education in these states which require racial segregation by law.[20]

Although it is on the higher and professional levels of education that the inequities resulting from a segregated system can best be demonstrated, there are some differentials in the indices of education which show up most graphically in the lower or primary levels. The following pages will demonstrate some of these differentials.

Inequities in Lower or Primary Education

THE TAX-PAYER'S DOLLAR

The tax-payer's dollar for public education in the South is divided between the schools for white children and the schools for Negro children. The average expense per white pupil in ten southern states in 1944-5 was 189% greater than the average expense per Negro pupil. Specifically, the tax-payer paid $88.70 to educate his white citizens and only $46.95 to educate his Negro citizens.

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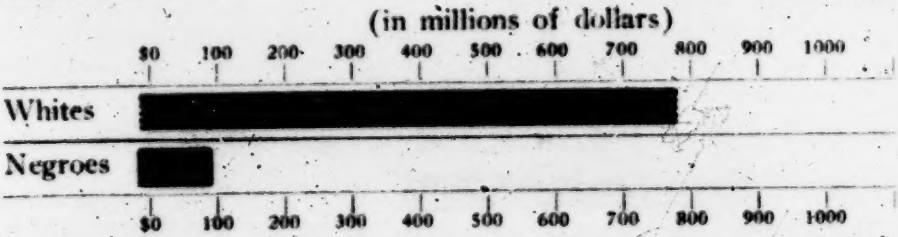
[20] Thompson, *Op. Cit.*, p. 264.

AVERAGE EXPENDITURE PER PUPIL IN AVERAGE DAILY ATTENDANCE: 1944-5[21]

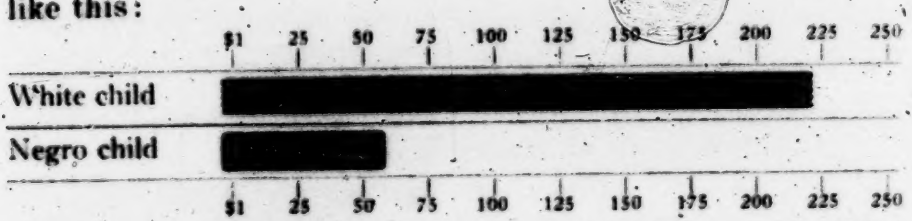
State	*White*	*Negro*	*% White is Greater*
Alabama	$68.07	$27.62	246%
Arkansas	$59.63	$27.22	219%
D. C. (1947)	$160.21	$126.52	127%
Florida	$108.02	$54.88	197%
Georgia	$88.13	$27.88	316%
Louisiana	$113.30	$34.06	333%
Maryland	$78.00	$69.00	113%
Mississippi *	$45.79	$10.10	453%
North Carolina	$74.86	$59.26	126%
South Carolina	$90.00	$33.00	273%
AVERAGE:	$88.70	$46.95	189%

* Per pupil enrolled.

The value of school property in 8 southern states * in 1944-5 amounted in all to $867,960,280.[22] Distributed, it looks like this:



On a per capita basis of enrolled students, the picture looks like this:



In other words, 427.6% more was invested for each white pupil than for each Negro pupil.

[21] *The Journal of Negro Education*, Howard University Press, Vol. XVI, Summer, 1947, passim.

* The eight states: Ala., Fla., Ga., Md., Miss., N. C., S. C., Tex.

[22] Washington, Alethea H., *The Journal of Negro Education*, Howard University Press, Summer Issue, Vol. XVI, 1947, p. 446.

AVERAGE VALUE OF SCHOOL PROPERTY PER PUPIL ENROLLED: 1944-5[23]

State	*White*	*Negro*	*% White is Greater*
Alabama	$143.00	$29.00	493%
Arkansas **	$142.87	$42.59	335%
Florida	$284.11	$59.76	475%
Georgia	$160.00	$35.00	457%
Louisiana **	$281.97	$50.29	561%
Maryland **	$364.06	$163.69	222%
North Carolina	$203.80	$73.08	279%
South Carolina	$204.00	$40.00	510%
Texas	$230.25	$76.79	300%
Virginia **	$221.51	$85.54	259%

** Data for these states is for 1943-4.

TEACHERS' SALARIES

The amount of salary paid teachers is an important factor in securing and holding capable teachers. In 1944-5 average salaries for teachers in the South were $1,513.57 for whites and $1,187.28 for Negroes.* The differential in the average for whites and Negroes amounted to $326.29, or phrased differently, the average salary per white was 127.5% greater than that per Negro.

[23] *The Journal of Negro Education*, Summer, 1947, passim, and *Statistics of State School Systems*, 1943-44.

* The salary paid Negroes in 1944-5 is lower than the average salary paid to all teachers in the United States in 1933-34.

AVERAGE ANNUAL TEACHERS SALARIES: 1944-45 [24]

State	*White*	*Negro*	*% White is Greater*
Alabama	$1,185.50	$ 784.50	158%
Arkansas	1,020.00	624.00	163%
Delaware	1,953.00	1,814.00	108%
Florida	1,757.07	1,174.34	150%
Georgia	1,130.00	540.00	209%
Kentucky	1,085.00 (medians)	1,225.00	
Louisiana	1,683.33	810.98	208%
Maryland **	2,085.00	2,002.00	104%
Mississippi	1,018.01	407.81	250%
Missouri	1,239.00	1,519.00	
North Carolina	1,294.50	1,305.59	
Oklahoma **	1,428.00	1,438.23	
South Carolina	1,314.00	785.50	167%
Tennessee	1,147.36	1,087.88	105%
Texas	1,627.00	1,136.00	143%
Virginia **	1,364.00	1,129.00	121%
West Virginia	.....	.....	.....
D. C.	3,400.00	3,400.00	.....
AVERAGE:	1,513.57	1,187.28	127.5%

** Data for these states is from *Statistics of State School Systems*, 1943-44.

n.b.

Ky.: Heavy concentration of Negro teachers in wealthier city districts accounts for higher salaries.

Mo.: Most Negro teachers are in the 2 largest cities where both groups are paid higher salaries than elsewhere in the state.

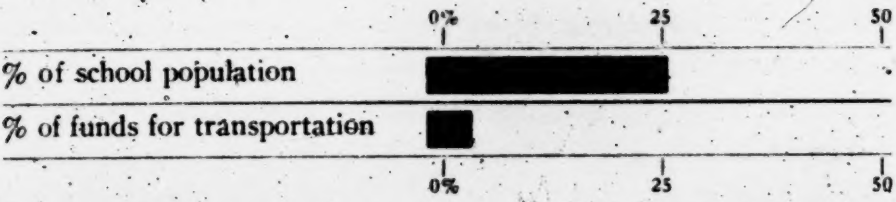
N. C.: Both groups are paid by the same salary schedule. Negroes are either better trained or have greater employment stability.

Tenn.: Negroes had .39 more college years of training.

D. C.: These salaries are estimates. Salary range is from $3,150-3,750.

Negro students, as reported for 1943-44, received only $1,349,834 (10 states reporting) out of a total of $43,448,777 spent by these states to take their children to and from school. Negro students, who in that same year comprised 25% of the school population in the South, received only 3.1% of all funds spent for transportation purposes.

[24] *The Journal of Negro Education*, Howard University Press, Vol. XVI, Summer, 1947, passim.



Whereas $6.11 is spent on an average per white child, only $.59 is similarly spent on each Negro child.[25] This means that even when the schools exist, Negro children encounter far greater difficulties in reaching them.

TRANSPORTATION EXPENDITURE: 1943-44 [26]

State	*White* (total)	*Negro* (total)	*White* (per capita enrolled student)	*Negro* (per capita enrolled student)
Alabama	$ 2,520,102	$ 179,927	$ 6.09	$ .79
Arkansas	1,508,979	107,083	5.01	1.07
Delaware	311,064	.....	9.05	...
D. C.	15,271	.....	.28	...
Florida	1,589,182	106,168	6.18	1.08
Georgia	2,777,531	71,523	6.52	.28
Kentucky	1,961,947	.....	4.02	...
Louisiana	3,389,131	.....	12.58	...
Maryland	1,370,715	231,846	6.10	3.91
Mississippi	3,170,384	60,000	11.52	.22
Missouri	4,270,391	.....	7.31	...
North Carolina	2,304,334	392,157	4.05	1.53
Oklahoma	2,464,424	192,449	5.77	5.28
South Carolina	1,410,421	8,681	5.66	.04
Tennessee	2,050,277	.....	4.07	...
Texas	5,888,904	397,663	5.64	1.99
Virginia	2,702,596	.....	6.89	...
West Virgina	1,995,627	.....	5.20	...
TOTAL:	$42,098,943	$1,349,834	$ 6.11	$ .59

The pattern of inequities resulting from segregation is uniform throughout the seventeen southern states and the

[25] *Statistics of State School Systems*, Government Printing Office, Wash., D. C., 1943-44.
[26] *Ibid.*

District of Columbia. In order to demonstrate briefly that these conditions pertain in Texas, a few data are included to show the inequities in the lower and higher levels of education.

EDUCATIONAL FACILITIES IN THE STATE OF TEXAS

Despite the fact that petitioner's State of Texas is a relatively wealthy state, the white median distribution of state-supported Negro classrooms is 200% greater than the Negro median.[27] If as much money was spent on the average Negro classroom unit as there was for whites, Texas would have to spend an additional $5,320,000 on its 7,600 Negro units.

The military rejection rates for failure to pass minimum "intelligence" standards in the war period of June-July 1943 showed great differentials between the rates for whites and Negroes. In Texas 10.4% of whites were rejected for this reason, while the comparative figure for Negroes was 20.5%.[28] In 1940 the functional illiteracy in the State of Texas was 16% for whites, but 36.4% for Negroes. Similarly, Texas spent $92.69 in 1947 to educate each white child, but only $63.12 to educate each Negro child.[29] Money invested in school property shows a similar pattern; Texas in 1944 invested $230.25 for each white child and $76.79 for each Negro child.[30]

The length of a school term is another index for good educational standards. In 1943-44 the average school term for Negroes in Texas was 7.7 days shorter for Negroes than it was for whites. (This is one-third of a school month.)[31]

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[27] Norton, John K., and Lawler, Eugene S., *An Inventory of Public School Expenditures in the United States*, Vol. I, pp. 91, 97.

[28] *The Black and White of Rejections for Military Service*, American Teachers Associations Studies, 1944, p. 6.

[29] *The Negro Yearbook*, 1947, Tuskegee Institute, p. 76.

[30] *Statistics of State School Systems*, Government Printing Office, Wash., D. C., 1943-44.

[31] *Ibid.*

A one-teacher, one-room type of school is ordinarily not the optimum condition under which to study. In Texas 68% of the schools for whites were of this type, but the figure for the Negro child was 81%. The amount of money spent for school transportation for each white child was $5.64, whereas only $1.99 was spent for each Negro child.

The present state of higher education in Texas follows the same patterns of discrimination established on the lower levels. Certain examples typify how state and federal funds allocated for the purpose of higher education are disproportionately channeled into the institutions for whites only.

1. In Texas, the highest salary paid a full professor at Prairie View University (Negro) is lower than the salary paid (one exception) in any of the 13 other public institutions for whites.[32]

2. Texas: "Public institutions for Negroes do not have as many students enrolled as the private institutions. Only 39.8 per cent of all Negro students enrolled in Texas colleges in 1929 were attending public institutions. This figure increased to 45.2 per cent in 1944. As far as enrollment is concerned, the burden of higher learning for Negroes is actually being carried for Texas by the Negro private college. . . . Five public and two private colleges offer courses in engineering for white students. There is no engineering course for Negro students in Texas. One public and one private college offer medicine to white students. There is no medical school for Negro students in Texas. With the exception of teacher-training, nursing, and Divinity, no professional training is available to Negroes within the state."[33]

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[32] See testimony of Dr. Charles H. Thompson in Record of this case, p. 262.

[33] *The Journal of Negro Education*, Summer, 1947, p. 431.

Petitioner has submitted this appendix in order to show a factual picture of the inequities which have and do result under a segregated system of education. This picture, as well as the general pattern of segregation, leads us to agree with this statement from the Report of the President's Commission on Higher Education:

> "We have proclaimed our faith in education as a means of equalizing the conditions of men. But there is grave danger that our present policy will make it an instrument for creating the very inequalities it was designed to prevent. If the ladder of educational opportunity rises high at the doors of some youth and scarcely rises at all at the doors of others, while at the same time formal education is made a prerequisite to occupational and social advance, then education may become the means, not of eliminating race and class distinctions, but of deepening and solidifying them.
>
> "It is obvious, then, that free and universal access to education, in terms of the interest, ability, and need of the student, must be a major goal in American education." [34]

[34] *Higher Education for American Democracy*, A Report of the President's Commission on Higher Education, Government Printing Office, Washington, D. C., December, 1947, Vol. I, p. 36.

Appendix Chart I

Public Institutions of Higher Education, Texas, 1945-46

	White	*Prairie View (Negro)*
% of population	85.7%	14.3%
Number of institutions *	15	2
% of institutions	88.2%	11.8%
Value of plant & equipment **	$72,790,097	$4,170,910
Value per capita population	$12.88	$4.71
Total expenditures	$32,007,219	$871,678
Expenditure per capita population	$5.85	$.94
State & Federal appropriation	$17,712,820	$297,318
Appropriation per capita population	$3.23	$.32
Total Current income	$33,912,086	$914,141
Library expense per year	$577,093	$19,720
Number of faculty ***	2,133 (av. 178)	118
Total salaries	$8,504,031	$253,133
Average salary	$3,987	$2,145
Number of students ***	43,040	1,576
% of all students in public institutions	96.5%	3.5%

* Unless otherwise indicated these figures are based on 13 institutions for whites and one for Negroes. Data for the others is not available (Thompson).

** The figure for whites is based on only 11 institutions.

*** The figures for whites are based on 12 institutions.
Data is from reports from the U. S. Office of Education, Form SRS-21.0-46, Parts I and II.

Appendix Chart II

Total Institutions of Higher Learning

	North & West	*South*		
		Total	*Negro*	*White*
% of total U. S. population	65.5%	34.5%	7.7%	26.7%
Total number of institutions	1066	634	104	530
% of all institutions	64.7%	37.3%	6.1%	31.2%
1 institution per every population	80,978.0	71,524.9	97,586.6	66,410.9
Total expenditures *	$573,074,370	$164,060,000	$13,438,000	$150,622,000
% of total expenditures	77.7%	22.3%	1.8%	20.5%
Expenditure per capita population	$6.66	$3.61	$1.32	$4.28
Average expenditure per institution	$537,593	$258,770	$129,212	$284,192
% of total population with 4 or more years of college **	2.9%	2.0%	0.1%	1.9%
% of respective population			0.5%	2.5%

Sources:

The Educational Directory, 1946-47, III, p. 7.
16th Census: 1940, Population, 2nd Series, U. S. Summary, p. 47.
The Journal of Negro Education, Summer 1947, p. 468.
Statistics of Higher Education, 1943-44, p. 70.

* Since the expenditures for 137 institutions (56 in the South, 81 in the North and West) were not reported, we made an average of those reporting per institution ($443,608.45), making an additional $59,404,358 thereby changing the total to $737,134,370 spent on higher education in the United States in 1943-44.

** Percent for the country as a whole is 2.6%.

Appendix Chart III

Length of School Term: 1943-44

State	*White*	*Negro*
Alabama	169.6	166.1
Arkansas	165.3	141.8
Delaware	181.5	181.7
D. C.	175.0	177.0
Florida	172.4	168.2
Georgia	175.3	165.0
Kentucky	159.2	171.6
Louisiana	180.0	156.7
Maryland	186.7	186.5
Mississippi	165.5	130.0
Missouri	182.4	193.9
North Carolina	179.9	179.9
Oklahoma	169.0	175.8
South Carolina	176.0	160.4
Tennessee	166.7	169.0
Texas	173.9	166.2
Virginia	180.0	180.0
West Virginia	172.1	173.7
AVERAGE:	173.5	164.0
U. S. AVERAGE:	175.5	

Statistics of State School Systems, 1943-44. Federal Security Agency, U. S. Office of Education.

Appendix Chart IV

Rejection Rates for Failure to Meet Minimum "Intelligence" Standards June-July, 1943: The South

State	Per Cent Rejected	
	White	Negro
Alabama	8.5	25.8
Arkansas	9.8	31.1
Delaware *		
D. C.	0.6	9.0
Florida	3.4	19.6
Georgia	8.2	27.4
Kentucky	6.1	5.4
Louisiana	6.0	30.6
Maryland	2.0	21.7
Mississippi	5.0	31.1
Missouri	2.1	10.4
North Carolina	10.7	16.3
Oklahoma	3.9	16.1
South Carolina	8.7	43.0
Tennessee	5.6	9.5
Texas	10.4	20.5
Virginia	8.4	18.8
West Virginia	4.7	4.8

The Black and White of Rejections for Military Service, American Teachers Association, 1944, p. 6.

* Less than 200 registrants during this period.

Appendix Chart V

Ratio of Professionals to Population by Race: The South, 1940

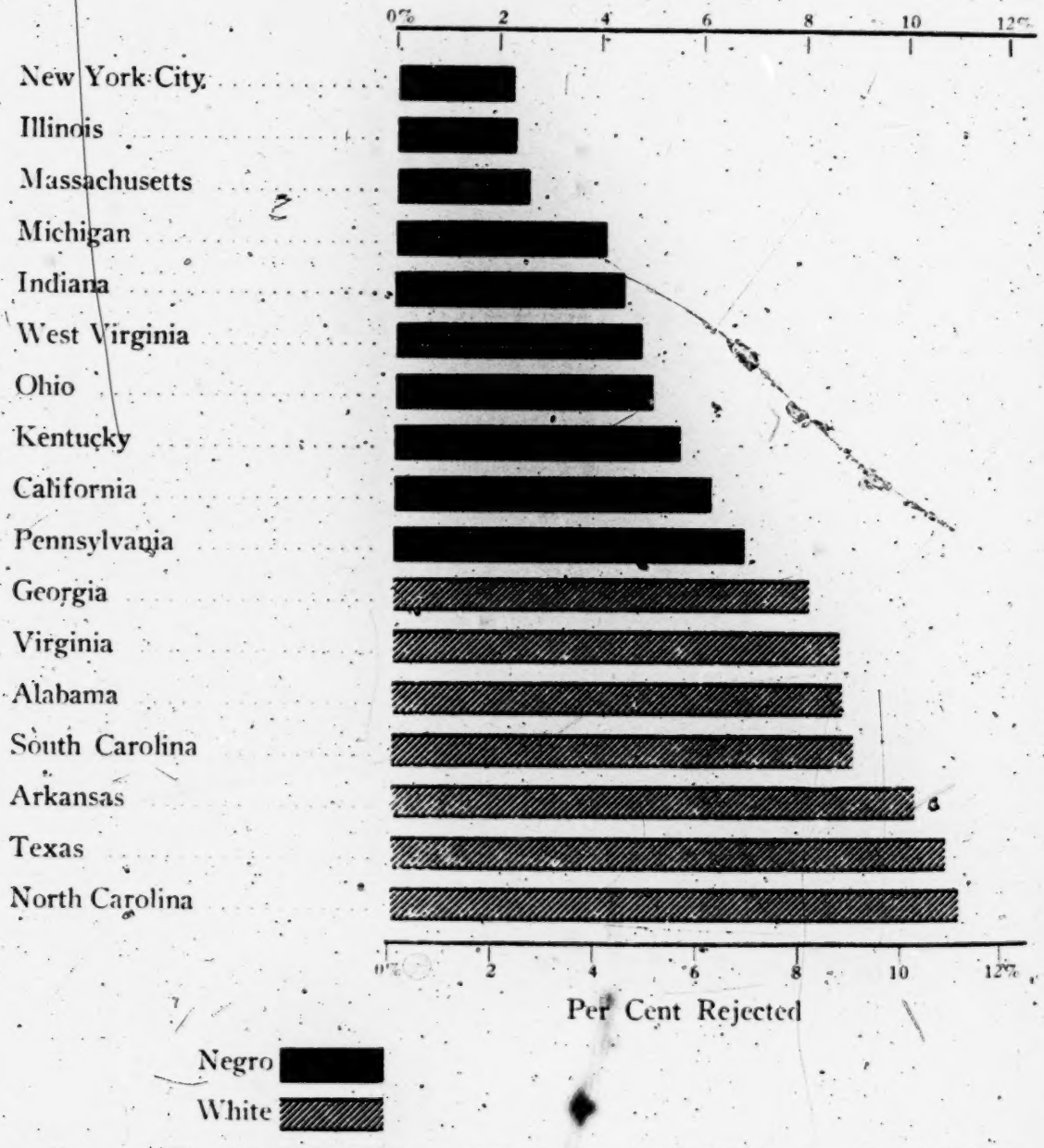
	Doctors		Dentists		Lawyers		Engineers		Pharmacists	
	W	N	W	N	W	N	W	N	W	N
Alabama	1,050	10,034	3,279	25,876	1,133	245,823	860	245,823	2,217	54,627
Arkansas	913	13,657	4,177	36,418	954	122,911	1,396	491,645	2,119	140,470
Delaware	714	4,485	2,305	7,175	941	17,938	218	. . . .	2,022	4,485
D. C.	308	955	1,113	2,881	100	2,497	151	15,606	651	4,355
Florida	704	5,843	2,050	13,185	507	51,420	637	. . . .	1,116	20,568
Georgia	850	6,955	2,651	21,699	760	135,616	802	216,985	1,625	49,315
Kentucky	1,070	2,326	3,458	7,380	997	10,192	1,181	71,344	2,626	14,269
Louisiana	686	9,132	2,043	23,314	796	141,551	555	141,551	1,492	24,266
Marvland	536	2,876	1,816	10,411	431	9,435	334	50,322	1,317	21,567
Mississippi	864	19,538	2,837	37,054	850	358,193	682	268,645	1,740	97,689
Missouri	733	1,228	1,588	5,200	661	6,789	616	34,912	1,466	9,399
N. Carolina	1,063	5,911	3,581	16,637	1,061	36,337	1,297	490,649	2,200	30,666
Oklahoma	976	2,156	2,931	8,850	643	6,726	658	28,025	1,669	8,007
S. Carolina	910	11,467	3,410	20,354	938	162,833	905	814,164	1,467	50,885
Tennessee	958	2,292	3,175	6,875	912	31,796	779	254,368	2,035	14,963
Texas	901	5,637	2,882	11,412	709	40,191	592	154,065	1,559	28,887
Virginia	818	3,985	2,604	10,499	636	13,780	551	165,362	1,705	20,044
W. Virginia	1,059	2,560	3,147	4,528	1,230	6,927	742	117,754	3,366	11,775
Total South										
Number	41,762	2,075	13,596	756	50,107	366	53,763	71	20,572	402
Ratio	843	4,891	2,589	13,425	702	27,730	655	142,944	1,711	25,246

Source: U. S. Census, Population, Labor Force, 1940.

Appendix Chart VI

Rejections of White Registrants in 7 Southern States and Negro Registrants in 10 Northern and Border States Due to Failure to Meet Minimum "Intelligence" Standards, 1943

(Selective Service Data)



Source: The Black and White of Rejections for Military Service, American Teachers Association, 1944.

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IN THE

Supreme Court of the United States

October Term, 1948

No. [redacted]44

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *ET AL.*

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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IN THE

Supreme Court of the United States

October Term, 1948

No. 667

HEMAN MARION SWEATT,
Petitioner,
vs.
THEOPHILIS SHICKEL PAINTER, *et al.*

REPLY BRIEF FOR PETITIONER.

The brief for the respondents in opposition to the petition for writ of certiorari filed herein is based upon two main points. It is claimed that the "separate but equal" doctrine first advanced in the case of *Plessy* v. *Ferguson*, 163 U. S. 537, has not only been uncontroverted by later decisions of this Court, but is controlling in this case to the extent of precluding the petitioner from challenging the validity of the segregation statutes of the State of Texas as applied to this case. This argument is followed by the contention that the only issue to be determined is the question of a comparison of the physical facilities of the two law schools.

The record in this case presents to this Court for the first time, the issue of the validity of state segregation statutes as applied to a Negro student seeking a legal education. The record in this case similarly presents for the first time, expert testimony which established the unreasonableness of racial classifications as applied to graduate and professional education.

I.

Under the theory advanced by the respondents, the states can with impunity, use race alone as the basis for classification for governmental purposes. Respondents further claim that such racial classifications cannot be challenged under any circumstances. The theory also carries with it the proposition that the effect of the enforced segregation of one racial group of law students is not a factor to be considered in deciding whether equal facilities are offered within the meaning of the Fourteenth Amendment.[1] If this position is correct, then all state statutes enforcing racial segregation in governmental functions are beyond challenge.

The right to be free from racial discrimination is one of the most important guaranties of personal freedom which our Constitution secures. This right cannot be protected by the use of a formula which seeks to evade rather than enforce equal protection. The petition for certiorari and brief in support thereof shows that later decisions of this Court have all but expressly overruled *Plessy* v. *Ferguson* and have consistently repudiated the *ratio decedendi* on which the separate but equal doctrine rests. Our position in this case holds that the racial discrimination inherent in the separate but equal doctrine of *Plessy* v. *Ferguson* is in the same position as was the doctrine of judicial fact of *Crowell* v. *Benson* in the case of *Estep* v. *United States* where Mr. Justice FRANKFURTER stated: "In view of the criticism which that doctrine as sponsored by Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285, brought forth and of the attritions of that case through later de-

---

[1] "Prior to the trial, the power of the State to classify, and the reasonableness of the classification as applied in this case, had been settled as a matter of law by this Court. Based thereon, evidence on the point was properly limited by the trial court." Point Three of Respondents' Brief, page 55.

cisions, one had supposed that the doctrine had earned a deserved repose." (337 U. S. 114, 142.)

On the other hand, respondents assert that the decisions of later cases including the *Gaines* case, 305 U. S. 337, the *Sipuel* case, 332 U. S. 631, and the *Fisher* case, 333 U. S. 147, have reemphasized the separate but equal doctrine. The validity of the segregation statutes of Missouri were not in issue in the *Gaines* case. In the *Sipuel-Fisher* case, this Court made it clear that the petition for certiorari in that case "did not present the issue where a state may not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes". The case was returned to the Oklahoma District Court where the issue was clearly raised and evidence was produced by experts, including recognized leaders in the field of legal education from all sections of the country, who gave their reasons why it is impossible for a Negro to obtain an education in a separate law school equal to that available in the regular law school. While this case was on appeal to the Supreme Court of Oklahoma, Mrs. Fisher was admitted to the law school of the University of Oklahoma and the appeal was dismissed as being moot.[2]

Respondents in their brief in this Court for the first time make an effort to show a basis for the racial classification in this case. In the development of the third point of respondents' brief, emphasis is placed upon such extraneous matters as the "Report of the State-Wide Survey of Public Opinion" of January 26, 1947. The inconclusiveness of such matters is emphasized by the reaction of the student body of the University of Texas as exemplified by recent

[2] A certified copy of the transcript of record of the Retrial of this case has been deposited with the Clerk of the Court

articles appearing in the campus newspaper of the University of Texas.[3]

II.

Point two of respondents' brief raises the procedural question brought about by their theory of the meaning of the equal protection of the laws clause of the Fourteenth Amendment. This point is:

> "The fact question of whether Petitioner was offered equal facilities is not properly before this Court because Petitioner did not present it to the Texas appellate courts for review. But assuming the issue to be properly before the Court, there is ample evidence to support the trial court's findings of fact and judgment."

Petitioner filed his exceptions to the findings and judgment of the trial court (R. 441). On appeal to the Court of Civil Appeals of Texas, petitioner included the following point:

> "The error of the Court in holding that the proposal of the State to establish a racially segregated law school afforded the equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and thus justi-

---

[3] A copy of the latest reaction to the admission of qualified Negroes to the professional schools of the University of Texas is set forth in the Appendix.

fied the denial of appellant's petition for admission to the law school of the University of Texas."[4]

This point was preserved in the motion for rehearing in the Court of Civil Appeals (Points IV and VII, R. 462-463); in application to Supreme Court of Texas for a writ of error (Points IV and V, Respondents' Brief, p. 107); and in the motion for rehearing in the Supreme Court of Texas (Points IV and V, R. 469).

The issue in this case was properly raised and has been preserved throughout this litigation. Petitioner, believing that this is a question of great public importance, has made every effort to present as complete a record as is legally possible. Respondents' brief demonstrates an unwillingness to have these issues determined.

Conclusion.

Access to public education is vital to our democratic way of life. Legal education is training for service to the state. Implicit in the meaning of democracy, is that its rights and obligations apply to all citizens without regard to race, color, creed or national origin. The petition for certiorari and brief in support thereof and respondents' brief in opposition thereto, when read together establish the overwhelming importance and significance of the issues raised in this case.

---

[4] Rule 418—Rules Civil Procedure of Texas provides that: "Such points will be sufficient if they direct the attention of the Court to the error relied upon."

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the court below, should be granted.

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Appendix.

DAILY TEXAN—September 18, 1949

MARK BATTERSON—

STUDENT BARNETT GLADLY WELCOMED

There hasn't been much said about it one way or the other, but a big step toward putting an end to one of Texas's most vicious evils is being taken in Galveston this week.

About the same time students here at the University start moving into classrooms, a 23-year-old man from Austin will go to his first classes at the medical branch at Galveston. His previous grades will compare favorably with those of any other student at the school, he will study just as hard as anyone else there this fall, and on the whole he would probably be a good example of an average medical student, except for one thing.

Herman Barnett, the student, is a Negro.

It's true that he will be there only on a temporary basis, but the fact remains that Barnett is the first of his race to finally make it into the same Texas classrooms as his fellow citizens. And no matter how he got there, it's a big step in a state abounding in superstition on the subject of races.

Later, non-segregation in education is going to spread until Negroes go to school here on Forty Acres.

And still later, Negroes will enter Texas high schools and grammar schools.

This won't come about by any sudden enveloping feeling of liberalism on the part of Texans as a whole, but will evolve simply through financial necessity. Texas can't

afford to maintain equal and separate institutions for its Negro population, and eventually it will have to drop the barriers.

What's more, there won't be any riots. On the contrary, we think that when the time comes, students who don't already see it will realize that capability doesn't depend on skin color, and discover that Negroes will hit the honor rolls in the same ratio as the white students.

They'll learn to sit down at the same tables with Negroes over at the Commons, and one day they'll use the same knives and forks that fed fellow Negro students the day before.

In spite of what they've been taught by superstitious parents, they'll find out that all of this won't contaminate them, and that Negroes are humans, with the same individual faults or merits that humans bear.

Higher institutions of learning are the logical places for segregation to begin its wilting process. Students are supposed to be on the whole of a higher mental caliber, and whether they really are or not, the fact remains that they at least have more of a chance to sharpen their reasoning processes enough to whittle down discrimination based on a medieval-like their subconscious.

In spite of what a lot of the more fiery brand of liberals seem to think, many white people simply can't help having the feelings they have on the subject of race. They have been raised to believe in their superiority, and even when their reasoning protests against it, they still have a hard time getting things straight in their subconscious.

We don't believe many people are purposely vicious in their attitudes, but it amounts to the same thing as far as the Negro is concerned. All of this is what makes it a

problem that will take time, patience, and a working abundance of common sense to solve.

The Galveston branch is lucky in getting a student like Barnett, just as his race is fortunate in having a representative of his caliber. Barnett is an honor graduate from Samuel Huston College, and he was an Air Corps officer during the war.

He was one of thirty-five Negroes who asked admittance to the University graduate school, the dental school at Houston, and the Galveston medical branch last fall. At the time, they were denied admittance.

Until someone shows us differently, we think that Barnett will come out all right at the Isle branch.

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IN THE

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October Term, 1949

No. 44

HEMAN MARION SWEATT,
Petitioner,

vs.

THEOPHILUS SHICKEL PAINTER, *ET AL.*

BRIEF FOR PETITIONER.

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Ga. Const., Art. VIII, Sec. 1, Ga. Code Ann., tit. 32, Sec. 937 (Supp., 1947) 35
Ky. Const., Sec. 187, Ky. Rev. Stat. Ann., Sec. 158.020 (Baldwin, 1943) 35
La. Const., Art. XII, Sec. 1 35
Md. Code Ann., Art. 77, c. 18, Sec. 192 (Flack, 1939) 35
Miss. Const., Art. VIII, Sec. 207, Miss. Code Ann., Sec. 6276 (1942) 35
Mo. Const., Art. XI, Sec. 3, Mo. Rev. Stat. Ann., Sec. 10349 (1943) 36
N. C. Const., Art. IX, Sec. 2, N. C. Gen. Stat., Sec. 115-2 (1943) 36
Okla. Const., Art. 1, Sec. 5, Okla. Stat., tit. 70, Sec. 455 (as amended Laws 1949, Art. 20, Sec. 9) 36

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S. C. Const., Art. XI, Sec. 7, S. C. Code, Sec. 5377 (1942) 36

Tenn. Const., Art. XI, Sec. 12, Tenn. Code Ann., Sec. 2377 (Williams, 1934) 36

Tex. Const., Art. VII, Sec. 7, Tex. Rev. Stat., tit. 49, art. 2900 (Vernon, 1942) 36

Va. Conn., Art. IX, Sec. 140, Va. Code Ann., tit. 11, § 33, Sec. 680 (1942) 36

W. Va. Const., Art. XII, Sec. 8, W. Va. Code Ann., Sec. 1775 (1949) 36

Other Authorities

American Teachers Assn., *The Black & White of Rejections for Military Service* (1944) 18, 24

Argument of Charles Sumner, Esq., Against the Constitutionality of Colored Schools in the case of Sarah C. Roberts v. Boston 21

Baruch, *Glass House of Prejudice* (1946) 29

Bettleheim and Janowitz, *Dynamics of Prejudice, A Psychological and Sociological Study of Veterans* (1950) 73

Blascoer, *Colored School Children in New York* (1915) 30

Bond, *Education of the Negro in the American Social Order*, 3 (1934) 27

Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 N. Y. U. L. Q. Rev. 16 (1938) 61

Boyer, *The Smaller Law Schools: Factors Affecting Their Methods and Objectives*, 20 Ore. L. Rev. 281 (1941) 17

Buck, *The Road to Reunion* (1937) 61

Bunche, *Education in Black and White*, 5 Journal of Negro Education 351 (1936) 27

Clark, *Negro Children* Educational Research Bulletin (1923) 24

Conant, *A Free Classless Society: Ideal or Illusion?* 42 Harvard Alumni Bulletin 245 (1939) 16

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Cong. Globe, 39th Cong., 1st Sess. (1865) 57
Cong. Globe, 39th Cong., 1st Sess. (1866) 55
Cong. Globe, 42nd Cong., 2nd Sess. (1872) 53, 57
Cong. Globe, 43rd Cong., 1st Sess. (1874) 16, 53, 57
Cong. Rec., 43rd Cong., 1st Sess. (1874) 59, 61
3 Cong. Rec., 43rd Cong., 2nd Sess. (1875) 61

Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology 259 (1948) 27
Dewey, *My Pedagogic Creed* (1929) 14
Dollard, *Caste and Color in a Southern Town* (1937) 27
Dombrowski, *Attitudes of Southern University Professors Toward the Elimination of Segregation in Graduate Schools in the South*, 19 The Journal of Negro Education 118 (1950) 22
Dowling, *Constitutional Law* (1946) 39
Douglas, *Stare Decisis*, 49 Col. L. Rev. 735 (1949) 47

Education for Freedom, Inc., *A Symposium of Radio Broadcasts on Education in a Democracy* (1943) 14, 30

Factors Affecting the Admission of High School Seniors to College (1949), A Report of Elmo Roper for Committee on a Study of Discriminations in College Admissions 64
Fairman & Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stanford L. Rev. 5 (1949) 37, 39, 56
Faris, *The Nature of Human Nature* (1937) 26
Flack, *The Adoption of the Fourteenth Amendment* (1908) 55, 56
Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527 (1947) 54
Frazier, *The Negro in the United States* (1949) 20, 22, 53

Gallagher, *American Caste and the Negro College* (1938) 29

Hamilton & Braden, *The Special Competence of the Supreme Court*, 50 Yale L. J. 1319 (1941) 34
Henrich, *The Psychology of Suppressed People* (1937) 27

PAGE

Holmes, *The Use of Law Schools*, Collected Legal Papers (1920) 17

James, *The Philosophy of William James* (1925) 29

Johnson, *Patterns of Segregation, II, Behavioral Response of Negroes to Segregation and Discrimination* (1943) 26, 27

Key, *Southern Politics in the State and Nation* (1949) 40

Klineberg, *Negro Intelligence and Selective Migration* (1935) 24

Klineberg, *Race Differences* (1935) 24

LaFarge, *The Race Question and the Negro* (1945) 29

Lasker, *Race Attitudes in Children* (1949) 26

Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L. J. 203 (1943) 17, 18

Loescher, *The Protestant Church and the Negro* (1948) 29

Locke, *Dilemma of Segregation*, 4 Journal of Negro Education 407 65

Long, *Psychogenic Hazards of Segregated Education of Negroes*, 4 The Journal of Negro Education 343 (1935) 26, 27

Lusky, *Minority Rights and the Public Interest*, 52 Yale L. J. 1 (1942) 12, 41

Mangum, Jr., *The Legal Status of the Negro* (1947) 27

Marx, *Effects of International Tension on Liberty Under Law*, 48 Col. L. Rev. 555 (1948) 41

McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreement, Covenants or Conditions in Deeds is Unconstitutional*, 33 Calif. L. Rev. 5 (1945) 31

McWilliams, *Race Discrimination and the Law*, 9 Science and Society No. 1 (1945) 27

Montague, *Man's Most Dangerous Myth—The Fallacy of Race* (1945) 24

Morgan, *Horace Mann, His Ideas and Ideals* (1936) 14

Moton, *What the Negro Thinks* (1929) 26, 27

Myrdal, *An American Dilemma* (1944) 20, 27, 28, 29

Park, *The Basis of Prejudice*, The American Negro, the Annals, Vol. 140 26

PAGE

Peterson & Lanier, *Studies in the Comparative Abilities of Whites and Negroes*, Mental Measurement Monograph (1929) 24

Report of the President's Committee on Civil Rights, *To Secure These Rights* (1947) 20, 27, 73

Report of the President's Commission on Higher Education, *Higher Education for American Democracy*, Vol. 1 (1947) 15, 21, 27

Rose, *America Divided: Minority Group Relations in the United States* (1948) 24

Rose, *The Negro's Morale: Group Identification and Protest* (1949) 26

Simpson, *The Function of a University Law School*; 49 Harv. L. Rev. 1069 (1936) 18

Smith, *Harlan Fiske Stone: Teacher, Scholar and Dean*, 46 Col. L. Rev. 708 (1946) 17

Smythe, *The Concept of "Jim Crow"*, 27 Social Forces 48 (1948) 28

Thompson, "Mis-Education for Americans", 36 Survey Graphic, 119 (1947) 29

Thompson, *Separate But Not Equal, The Sweatt Case*, 33 Southwest Review 105 (1948) 22, 30, 36, 52

Thompson, *Some Progress in the Elimination of Discrimination in Higher Education in the United States*, 19 Journal of Negro Education 1 (1950) 30

Tussman & ten Broek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949) 10, 34, 54

United States 16th Census, Population, 2nd Series, U. S. Summary (1940) 27, 63

United States Office of Education, *Educational Directory*, Vol. III (1946-47) 63, 64

United States Office of Education, *Statistics of Higher Education* (1943-44) 63

Ware, *The Role of the Schools in Education for Racial Understanding*, 13 Journal of Negro Education (1944) 26

Warner, *New Haven Negroes* (1940) 30

Young, *America's Minority Peoples* (1932) 27

Notes

	PAGE
36 Col. L. Rev. 283 (1936)	34
40 Col. L. Rev. 531 (1940)	34
46 Col. L. Rev. 639 (1946)	30
49 Col. L. Rev. 629 (1949)	34, 54
13 Mo. L. Rev. 286 (1948)	21
46 Mich. L. Rev. 639 (1948)	30
41 Yale L. J. 1051 (1931)	34
56 Yale L. J. 1051 (1947)	27
(Editorial Note) 19 Journal of Negro Education 4 (1949)	22

IN THE

Supreme Court of the United States

October Term, 1949

No. 44

HEMAN MARION SWEATT,
Petitioner,

vs.

THEOPHILUS SHICKEL PAINTER, *et al.*

BRIEF FOR PETITIONER.

Opinions Below.

The Texas Court of Civil Appeals remanded this cause without prejudice, then affirmed the judgment of the court below and finally denied petitioner's motion for rehearing. These decisions are set out in the record at pages 434-435, at pages 445-460, and at pages 460-461 respectively. The only reported opinion can be found in 210 S. W. 2d 442. The opinion of the Supreme Court of Texas denying application for writ of error and overruling the motion for rehearing may be found at pages 466, and 471 of the record. They are not reported.

Jurisdiction.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, this being a case involving rights secured under the Fourteenth Amendment to the Constitution of the United States. Petitioner commenced this action in the state courts of Texas on May 16, 1946. The District Court of Travis County, Texas denied his petition for writ of mandamus on June 17, 1947 (R. 438-440). The Texas Court of Civil Appeals affirmed this judgment on February 25, 1948 (R. 445-460, 465),[1] and the Supreme Court of Texas refused application for writ of error on September 29, 1948 (R. 466). At each and every stage of this proceeding, petitioner has raised and maintained his basic contention that unless he is admitted to the University of Texas, which Texas maintains for whites, he is denied the equal protection of the laws required under the Fourteenth Amendment.

Statement of the Case.

On May 16, 1946, petitioner filed in the 126th District Court of Travis County, Texas, a petition for a writ of mandamus seeking his admission to the University of Texas School of Law from which he had been excluded solely because of race and color (R. 403-408). On June 17, 1946, a hearing was held, and on June 26 the District Court entered judgment declaring the state's refusal to admit petitioner to the University of Texas School of Law constituted a denial of the equal protection of the laws since

[1] There were three hearings in the lower court and two arguments before the Court of Civil Appeals. These details are explained *infra* under Statement of the Case. Referred to here are the final hearings only in these two tribunals.

this institution is the only one within the state which provides legal training. The court, however, refused to grant the writ at that time and gave respondents six months to provide a course of legal instruction "substantially equivalent" to that which was provided at the University of Texas and retained jurisdiction of the cause during that period (R. 424-426).

On December 17, 1946, a second hearing was held, and the court entered final judgment dismissing the petition on the ground that the state had made available another law school providing legal training "substantially equivalent" to that offered at the University of Texas and, therefore, had complied with its order of June 26. This judgment was entered although the record clearly shows that no such law school had been established for petitioner and other Negroes. The state had only promised to furnish separate legal educational facilities in the future (R. 426-432).

On March 26, 1947, the Court of Civil Appeals set aside the judgment of the trial court without prejudice and remanded the cause for further proceedings (R. 434-435). On May 12-18, 1947, a trial on the merits was held in the lower court. On June 17, 1947, judgment was entered for respondents, and the petition for writ of mandamus was dismissed (R. 438-440). This decision the Court of Civil Appeals affirmed on February 25, 1948. Its opinion appears on pages 445-460 of the record.

Motion for rehearing was denied on March 17, 1948 (R. 460), with opinion (R. 460-461). The opinion is reported in 210 S. W. 2d 442.

On September 8, 1948, the Supreme Court of Texas denied application for writ of error, without opinion

(R. 466) and on October 27, 1948, a motion for rehearing was overruled (R. 471). They are not officially reported.

Thereupon petitioner brought the cause here, and his petition for writ of certiorari was granted on November 7, 1949 (R. 473).

Statement of Facts.

Over four years ago, petitioner duly filed an application for admission to the University of Texas School of Law. He possessed all the qualifications necessary for admission. It is conceded that his being a Negro was the sole reason for respondents' refusal to admit him. When the May 16th and December 17th, 1946 hearings were held, the only state-supported law school in existence was the law school at the University of Texas which was maintained exclusively for whites. Thus from the time petitioner made application to the University of Texas on February 26, 1946, through the May 16th and December 17th hearings, respondents refused to admit him to the only existing state facility, although they had made no other provision for his education. Yet their defense was that they were required to furnish petitioner "separate but equal" facilities.

While the first appeal was pending in the Court of Civil Appeals, a separate law school for Negroes was established to which petitioner on March 20, 1947, was invited to attend (R. 175). It has been petitioner's contention all along that the state has no authority to exclude him from the University of Texas School of Law merely because of his race and color, and that this separate Negro institution was not and could not be the equivalent of the law school of the University of Texas.

Errors Relied Upon.

I.

The Texas Court was in error in holding that the "separate but equal" doctrine did not violate petitioner's right to equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

II.

The Texas Court was in error in holding that the law school established for Negroes at Austin was "substantially equal" to the law school which the state makes available to non-Negroes at the University of Texas.

III.

The Texas Court was in error in holding that the respondents were not required under the Fourteenth Amendment to the Federal Constitution to admit petitioner to the school of law of the University of Texas on the same basis as it admits qualified non-Negro applicants.

IV.

The Texas Court was in error in refusing to admit evidence showing that in its application the "separate but equal" doctrine inevitably results in the Negro facility being inferior and hence that the doctrine results in discrimination based upon race and color in violation of the Federal Constitution.

Summary of Argument.

Petitioner contends that the Court should reverse the judgment of the court below on the grounds that the equal protection clause of the Fourteenth Amendment, as properly construed, is not conducive to an interpretation which would permit the State to exclude him from the University of Texas School of Law solely because of his race and color.

The equal protection clause has both a broad and a specific purpose which may be described as follows: First, it was broadly intended to insure that all persons similarly situated would be treated alike in their relationships with the state. Second, it was specifically meant to prohibit any state from denying to Negroes, as such, any rights, privileges or advantages which it offers or makes available to white persons.

The first purpose has been interpreted as an interdiction against arbitrary governmental action, and hence any classification or distinction which a state makes can be justified only when it relates to some real difference having pertinence to a legitimate legislative objective. The second purpose has been interpreted as embodying a fundamental hostility to racial distinctions and classifications, and as incorporating into the fundamental law the democratic credo that governmental action based upon race and blood are necessarily arbitrary. Petitioner contends that respondents' refusal to admit him to the University of Texas School of Law, solely because of his race, while admitting white persons as a matter of course, defeats both of these purposes, and hence subjects him to a violation of constitutional rights.

Respondents' attempt to justify their conduct is in the nature of confession and avoidance. They admit that their

refusal to allow petitioner to enter the University of Texas School of Law is because of his race. They contend, however, that such conduct has been cured of unconstitutionality because he may now secure legal training at a Negro law school "substantially equivalent" to that being offered at the University of Texas. In support of their position, they rely chiefly on *Plessy* v. *Ferguson*, 163 U. S. 537.

Petitioner maintains that *Plessy* v. *Ferguson* is not applicable to this case. Whatever view may be taken as to the correctness of the *Plessy* doctrine, this Court has never applied that doctrine to education. Petitioner submits that the very purpose which education is designed to achieve in a democratic society is at war with the imposition of the arbitrary standards inherent in racial segregation. Petitioner further maintains that the application of the "separate but equal" formula inevitably results in racial discrimination. In every instance those facilities which the state has set aside for Negroes as "separate but equal", measured by any conceivable standard, have been graphically inferior in nature to schools available to all other persons. The record discloses that this case is no exception.

This Court has long recognized that the Constitution is given contour and meaning only to the degree that its provisions are properly applied to existing fact. An assumption of equality under the doctrine of the *Plessy* case nullifies the basic intendment of the equal protection clause when, as here, such equality is belied by actuality. This doctrine, therefore, is not a valid precedent for determining the constitutionality of respondents' acts.

If the Court should believe otherwise, petitioner submits that the fallacious doctrine of *Plessy* v. *Ferguson* must be reexamined. Such reexamination will reveal that this doctrine inevitably results in the application of unequal and

discriminatory standards by the state in its relations with Negroes, as contrasted with the standards employed in its relations with white persons. This is a denial of equal protection of the laws. Petitioner submits, therefore, that the Court should issue a mandate requiring respondents to admit him to the University of Texas School of Law on a non-discriminatory basis, and that *Plessy* v. *Ferguson* should be overruled.

ARGUMENT.

I.

The State of Texas is forbidden by the equal protection clause of the Fourteenth Amendment to the United States Constitution to deny petitioner's admission to the University of Texas solely because of considerations of race and color.

Petitioner has been refused admission to the University of Texas because he is a Negro. Respondents defend this refusal on the ground that state constitutional and statutory law requires Negroes and non-Negroes to be educated in separate schools, and that such racial segregation in the state's educational system is permitted by decisions of this Court. Petitioner contends that refusal to admit him to the University of Texas solely on the basis of his race or color is in violation of the equal protection clause of the Fourteenth Amendment because: (1) differences in race afford no rational foundation for differences in treatment, and the equal protection clause permits only such differences in treatment which accord with judicial concepts of reasonableness; (2) such differences in treatment violate all notions of reasonableness when used to determine the availability of public educational institutions on the law school

level; and (3) in any event, under the equal protection clause a governmental classification based upon race or color is unconstitutional *per se*.

A. In making admission to the University of Texas School of Law dependent upon applicant's race or color, Texas has adopted a classification wholly lacking in any rational foundation. Therefore, it is invalid under the equal protection clause.

Under Texas law, only whites, or more accurately all racial or color groups other than Negroes, may attend the University of Texas School of Law. Negroes must secure whatever legal educational opportunities Texas offers to them at a separate institution. Even if we assume, *arguendo*, that there are circumstances in which a state has the power to make race or color the basis of a legislative classification (a proposition which we reject in its entirety), nevertheless, we submit, that the difference in treatment, of which petitioner here complains, is one which bears no rational relationship to any valid legislative end, and hence constitutes that form of differential treatment which contravenes the equal protection clause.

The basic purpose and intent of the equal protection clause of the Fourteenth Amendment was to prohibit a state from denying its Negro citizens any right it gave or offered its white citizens. *Strauder* v. *West Virginia*, 100 U. S. 303. A secondary purpose was to insure that all persons similarly situated would receive like treatment and that no special groups or classes should be singled out for favorable or discriminatory treatment. *Southern Railway Co.* v. *Greene*, 216 U. S. 400; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Maxwell* v. *Bugbee*, 250 U. S. 525.

It will be observed that the secondary purpose is broader in scope than the first, since it is not primarily concerned

with racial distinctions but with arbitrary distinctions of any kind. To determine if state legislation subserves that secondary purpose, this Court does not prohibit all but only certain types of legislative distinctions. This adjustment has been necessary because the requirements of equal protection pose a relatively difficult problem. Classification by definition implies the imposition of duties and burdens upon a special class, different from that to which the general public is subject. *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580; *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619; *Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Clark* v. *Kansas City*, 176 U. S. 114.[2]

An interpretation of the equal protection clause, however, as wholly depriving the states of this power, would seriously threaten the orderly administration of government.[3] Yet, if the states are not carefully limited as to the classifications they may make, the equal protection clause would become meaningless. Therefore, the Court when dealing with this type of legislation has devised the following test: If a classification is to conform to the constitutional mandate of equal protection, it must be based upon some real or substantial difference which has pertinence to a valid legislative objective, *e. g.*, *Dominion Hotel* v. *Arizona*, 249 U. S. 265; *Maxwell* v. *Bugbee*, *supra*; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352; *Great Atlantic & Pacific*

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[2] See also: Tussman & ten Broek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949) for a scholarly analysis of the treatment of the equal protection clause by this Court.

[3] "* * * * the machinery of government would not work if it were not allowed a little play in its joints." Mr. Justice Holmes, *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 501.

Tea Co. v. *Grosjean*, 301 U. S. 412; *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Groessart* v. *Cleary*, 335 U. S. 464.[4]

On the other hand where alleged differences on which the classification rests do not in fact exist, or cannot be reasonably or rationally related to the legislative end, the classification violates the constitutional requirement of equal protection, *e. g.*, *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Southern R. Co.* v. *Greene*, *supra*; *Truax* v. *Raich*, 239 U. S. 33; *Smith* v. *Cahoon*, 283 U. S. 553; *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266; *Skinner* v. *Oklahoma*, 316 U. S. 535. The above formula has been consistently followed by this Court without deviation since the adoption of the Fourteenth Amendment, as the most effective method of giving life and substance to the mandate of equal protection, while at the same time permitting the state freedom to deal with the everyday problems of government.[5]

In this case, Texas uses the dissimilarity of race and color between Negroes and non-Negroes as the basis for determining eligibility to attend the University of Texas. There are, in effect, two systems of education—one for Negroes and one for non-Negroes. If we are to test the constitutionality of this classification by the applicable standards of this Court, we must first discover and examine the objective the state is attempting to accomplish in providing educational advantages for its citizenry through the graduate and professional school levels, and then determine what relevance, if any, race and skin pigmentation may have to such purposes.

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[4] See: *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, for an excellent analysis of Court's approach to a classification problem.

[5] Of course there has been considerable disagreement on the Court as to whether these principles were being properly or appropriately applied. See *e. g.* Mr. Justice RUTLEDGE's dissent in *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552, 565, but the formula itself has never been questioned.

1. *There is no valid basis for the justification of racial segregation in the field of education. Enforced racial segregation aborts and frustrates the basic purposes and objectives of public education in a democratic society.*

In our search of cases and literature on the subject, both legal and otherwise, the only bases that we have been able to find on which states have attempted to justify laws which require the segregation of races in educational facilities are: (1) That racial segregation in some way aids in the accomplishment of the objectives which a state is attempting to bring about in setting up a system of public education; (2) that segregation laws are necessary to preserve public peace and good order; and (3) that races are of unequal ability to participate in the educational process and therefore separate treatment is required. We submit that there is no rational connection between racial differences and any valid legislative objective which a state may attempt to promote in providing public education. In this area, therefore, identical treatment of the races is mandatory.

a. Our way of life is founded on a system which places reason above coercion.[6] *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496. Mr. Justice BRANDEIS, in a concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 375 said:

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; that in its government the deliberative forces should prevail over the arbitrary."

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[6] For a discussion of the national interest in elimination of racial discrimination and of the differences between ours and a totalitarian system see: Lusky, *Minority Rights and the Public Interest*, 52 Yale L. J. 1 (1942).

We have come to realize that democratic processes can only operate effectively where there is an alert and enlightened citizenry. In order to make certain that our citizens are equipped to make rational decisions and thus maintain and preserve our democratic institutions, it is vital that their individual skills and values, as well as a pragmatic belief in the basic tenets of democracy, be developed through the medium of education. This function of education has become so important that it is no longer left solely in the hands of the parents or philanthropists.[7] It is one of the highest functions of state government. In order that Americans may develop their intellectual capacities and ethical principles to the fullest, and thus participate most effectively in the responsibility and duties of citizenship, all the forty-eight states have uniformly undertaken to provide educational benefits at a minimum cost to the individual citizen.

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[7] As stated in 47 Am. Jur., Schools, Section 6, page 299, at common law, the parent's control over his child extended to the acquisition of an education. The parent's common law rights and duties in this regard "have been generally supplemented by constitutional and statutory provisions, and it is now recognized *that education is a function of the government.*" (Italics ours.)

There is another important reason for the trend towards public rather than private education, particularly at the university level. The cost of maintaining a large university at a high standard has become so prohibitive that some of our oldest and best private institutions are in grave financial straits which, unless alleviated, might necessitate their closing down. See: Address of Dr. Seymour of Yale University to alumni on February 5, 1950, as reported in N. Y. TIMES, February 6, 1950, page 27, and in the N. Y. HERALD TRIBUNE, February 6, 1950, on page 3.

Dr. Alonzo F. Myers, Chairman of the New York University Department of Higher Education, at the annual luncheon of the Tuition Plan held in New York City on February 16, 1950, stated that higher education must be expanded to meet growing needs. He felt, however, that this expansion must occur largely in publicly supported institutions and stressed the grave financial crisis of 500 small private colleges. N. Y. TIMES, February 17, 1950, page 1.

b. If it be a basic principle of our American credo that education is a necessary function of democracy, then it follows logically that education must be made available to *all* citizens. Horace Mann, one of the most illustrious names in the history of American pedagogy, said:[8]

> "Education must be universal * * * The theory of our government is—not that all men, however unfit, shall be voters—but that every man, by the power of reason and the sense of duty, shall become fit to be a voter. Education must bring the practice as nearly as possible to the theory. As the children now are, so will the sovereigns soon be. How can we expect the fabric of the government to stand, if vicious materials are daily wrought into its framework. Education must prepare our citizens to become municipal officers, intelligent jurors, honest witnesses, legislators, or competent judges of legislation—in fine, to fill all the manifold relations of life. For this end, it must be universal."

Mortimer J. Adler, professor of law at the University of Chicago, stated the same proposition in these terms:[9]

> "Liberal education is developed only when a curriculum can be devised which is the same for all men, and should be given to all men, because it consists

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[8] Morgan, *Horace Mann—His Ideas and Ideals*, 98 (1936).

[9] Education for Freedom, a Series of Radio Lectures sponsored and published by the Education for Freedom, Inc., New York (1943). Other lectures by Mark Van Doren and Dr. Robert M. Hutchins, among others, also included pertinent remarks on this subject; 7 Dewey, *My Pedagogic Creed* 6 (1929). (Although originally published in 1897 it was republished by the Progressive Education Assn. in 1929.)

> in those moral and intellectual disciplines which liberate men by cultivating their specially rational power to judge freely and to exercise free will * * * *"

It has never been regarded as sufficient that some educational facilities be afforded to some of the citizens of this country. All of our educators, sociologists, and parent-groups, have uniformly held that the sources and tools of learning be given to all citizens alike no matter to what group, sect, race, or color they belong. The strength of a democratic educational system rests not only in its universality, but in its freedom from arbitrary distinctions. The highest goal of a teacher in a democracy is to teach democracy. To permit racial segregation in American schools is to contradict the basic purpose for which the schools exist. In 1947 the Report of the President's Commission on Higher Education read:[10]

> "* * * the role of education in a democratic society is at once to insure equal liberty and equal opportunity to differing individuals and groups, and to enable the citizens to understand, appraise, and redirect forces, men, and events as these tend to strengthen or to weaken their liberties."

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[10] A Report of the President's Commission on Higher Education, *Higher Education for American Democracy*, Vol. 1, 5 (1947); also at page 5 see: "American society is a democracy: That is, its folkways and institutions, its arts and sciences and religions are based on the principles of equal freedom and equal rights for all its members, regardless of race, faith, sex, occupation, or economic status. The law of the land, providing equal justice for the poor as well as the rich, for the weak as well as the strong, is one instrument by which a democratic society establishes, maintains, and protects this equality among different persons and groups. The other instrument is education, which, as all the leaders in the making of democracy have pointed out again and again, is necessary to give effect to the equality prescribed by law."

The language of Mr. Justice FRANKFURTER in the case of *Illinois ex rel. McCollum* v. *Board of Education* similarly supports this proposition.[11]

Education is not only a component part of free democratic living, but is the very essence of and medium through which democracy can be effected. The intent of the framers of the Fourteenth Amendment was indicated in the 43rd Congress in 1874 by these words: "* * * that all classes should have the equal protection of American law and be protected in their inalienable rights, *those rights which grow out of the very nature of society, and the organic law of this country.*"[12] (Italics ours.)

c. These statements define the overall purposes and functions of education in a democratic society. On the professional level, the function of the state-supported law school enjoys an even greater significance. For it has been

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[11] *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 216, 217: "The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."

[12] 1 Cong. Globe, 43rd Congress (1874); Conant, "A Free Classless Society: Ideal of Illusion?": Address given at N. Y. HERALD TRIBUNE Forum on Current Problems, 1939; Printed in 42 Harvard Alumni Bulletin 245 (1939) with consent of Herald Tribune: The Bill of Rights and academic freedom go hand in hand. Dislike of governmental tyranny and hatred of restraints on man's intellectual power are close allies * * * If I am correct, what choice have those who teach our youth? None but to hope that the American ideal is not an illusion, that it is still valid; none but to labor unremittingly for a type of education which will every day quietly loosen the social strata; none but to believe that through the functioning of our schools and colleges American society will remain in essence classless and, by so doing, even in days of peril, preserve the heritage of the free."

said by legal scholars and sociologists that: "We are a nation that professes deep regard for the dignity of men and that in practice relies to an extraordinary degree upon the advice of professional lawyers in the formation and execution of policy." [13]

The late Chief Justice STONE described the law in terms of its sociological significance: [14]

> "Law performs its function adequately only when it is suited to the way of life of a people. With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in a modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and future . . . We are coming to realize more completely that law is not an end, but a means to an end—the adequate control and protection of those interests, social and economic, which are the special concern of government and hence of law."

The objectives of the modern law school have been described as being four-fold in nature: (1) to prepare for public service; (2) to prepare for practice; (3) to prepare for law teaching; and (4) to prepare for legal research. [15]

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[13] Lasswell and McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale L. J. 203, 291 (1943).

[14] Smith, *Harlan Fiske Stone: Teacher, Scholar and Dean*, 46 Col. L. Rev. 708 (1946); See also: Holmes, *The Use of Law Schools*, Collected Legal Papers 39-40 (1920) where Mr. Justice HOLMES said that the aim of the law school must be "not to make men smart, but to make them wise in their calling—to start them on a road which will lead them to the master."

[15] Boyer, *The Smaller Law Schools: Factors Affecting Their Methods and Objectives*, 20 Ore. L. Rev. 281 (1941).

It is the special duty of legal education to supply "our social mechanics and many, if not most of our social inventors".[16] From this source stem our main body of civic leaders, judges, legislators and other public servants. It is the law school which trains "policy makers for the even more complete achievement of the democratic values that constitute the professed ends of American policy".[17]

It is evident that the role of education in our society today is one of equipping our citizens with information and specific skills in order that they may productively enjoy the benefits of democracy. It is also evident that if we are to preserve our traditions of freedom, and if we are to compete successfully at home and abroad with other ideologies and philosophies, our people must above all be trained and enlightened.[18]

If an enlightened citizenry is a necessary factor in the equation of democracy, then it follows that education is an integral part of the democratic process. Assuming that education is merely a privilege, it is one of such a peculiar and precious nature that those entrusted with its administration have a compelling duty rather than mere discretionary power to see that no distinctions are made on the basis of race, creed or color. Unless Texas has some pur-

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[16] Simpson, *The Function of a University Law School*, 49 Harv. L. Rev. 1069 (1936).

[17] Lasswell and McDougal, *supra* note 13, at 206.

[18] The importance of education in terms of national welfare and national interest can be emphasized in another manner. The armed forces reported that in the critical June-July 1943 period, when the manpower needs for the armed services were at their peak, 34.5% of the Negro rejections were for educational deficiencies. American Teachers Assn. *The Black & White of Rejections for Military Service* 5 (1944).

pose other than these democratic objectives outlined above,[19] it must permit all persons without regard to class or race to participate in these benefits on an equal basis.

Racial separation, as it relates to a function as vital to the maintenance of democratic institutions as education, endangers devotion to the very ideals which education is supposed to instill. The segregated citizen cannot give full allegiance to a system of law and justice based on the proposition that "all men are created equal" when the community denies that equality by compelling his children

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[19] It may be that Texas has the same objective Mississippi has. The Mississippi Supreme Court in *Rice v. Gong Lum*, 139 Miss. 760, 104 So. 105, 108, described the segregation policy of the state as being required to preserve the purity and integrity of the white race and its social policy. "In our State no statute has defined the term 'colored race' and considering the policy of the State indicated above we think the Constitutional Convention used the word 'colored' in the broad sense rather than the restricted sense, its purpose being to provide schools for the white or Caucasion race, to which schools no other race could be admitted, carrying out the broad dominant purpose of preserving the purity and integrity of the white race and its social policy. (Marriage between Mongolian and whites and whites and Negro prohibited but not as between Negro and Mongolian.)

To all persons acquainted with the social conditions of this State and of the Southern States generally, it is well known that it is the earnest desire of the White Race to preserve its racial integrity and purity and to maintain the purity of the social relations as far as it can be done by law. It is known that the dominant purpose of the two sections of the Constitution of our State was to preserve the integrity and purity of the White Race. When the public school system was being created it was intended that the White Race should be separated from all other Races * * * Taking all of the provisions of the law together it is manifest that it is the policy of this State to have and maintain separate schools and other places of association for the Races so as to prevent race amalgamation. Race amalgamation has been frowned on by Southern Civilization always, and our People have always been of the opinion that it was better for all races to preserve their purity. However, the segregation laws have been so shaped as to show by their terms that it was the White Race that was intended to be separated from the other races."

(Footnote continued on p. 20)

to attend separate schools. Nor can a member of the dominant group fail to see that the community at large is daily violating the very principles in which he is being taught to believe.[20]

It is essential for the successful development of our country as a nation of free people that the understanding and tolerance which we wish practiced in later life be fostered in the classroom. A statement by Mr. Charles P. Sumner in 1849 has particular relevancy here.

> "And since according to our institutions, all classes meet, without distinction, in the performance of civil duties, so should they all meet, without distinction of color, in the school, beginning there those

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(Footnote continued from p. 19.)

Realistically, segregation is intended to maintain and foster a belief in white supremacy and Negro inferiority, as is so frankly inferred in the above quote from the Mississippi court. Another facet of this belief may be gleaned from the fact that in those states where the segregation of the races is required, it is libelous *per se*, and in most instances slanderous *per se*, to label a white man as a Negro. *Sportono* v. *Fourichon*, 40 La. Ann. 423, 4 So. 71 (slander); *Upton* v. *Times Democrat Publishing Co.*, 104 La. 141, 28 So. 970 (libel); *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229, 184 P. 946 (libel); *Flood* v. *Evening Post Publishing Co.*, 71 S. C. 122, 50 S. E. 641 (libel); *Flood* v. *News and Courier Co.*, 71 S. C. 112, 50 S. E. 637 (slander); *Spencer* v. *Looney*, 116 Va. 767, 82 S. E. 745 (slander); *Morris* v. *State*, 109 Ark. 530, 160 S. W. 387 (slander). Cf. *Plessy* v. *Ferguson*, *supra* at 549; Contra: *Kenworthy* v. *Brown*, 92 N. Y. S. 34; see also *Davis* v. *Meyer*, 115 Nebr. 251, 212 N. W. 435.

If belief in inferiority of Negroes is the basis for Texas policy; or if segregation is founded upon racial malice or animosity, then unquestionably the legislative objection is unconstitutional. *Korematsu* v. *United States*, 323 U. S. 214.

[20] Many recent studies have pointed up the debilitating effect this conflict between ideals and practice causes in America. See particularly Myrdal, *An American Dilemma* (1944) passim and chap. 45 for the analysis of this conflict between ideals and practice. President's Committee on Civil Rights, To Secure These Rights (1947); Frazier, The Negro in the United States (1949).

> relations of equality which our Constitution and laws promise to all." [21]

Nor can it be argued that separation is a more effective and economical method of providing educational advantages. It is generally agreed that the duplication which segregation requires makes the maintenance of a dual system of education more expensive and in general lessens the quality of education which would be available to all under an unsegregated system.[22]

> "Segregation lessens the quality of education for the whites as well. To maintain two school systems side by side—duplicating even inadequately the buildings, equipment, and teaching personnel—means that neither can be of the quality that would be possible if all the available resources were devoted to one system, especially not when the States least able financially to support an adequate educational program for their youth are the very ones that are trying to carry a double load." [23]

The conclusion, therefore, that the use of race or color as a classification for the purpose of determining the availability of educational institutions bears no relation to the state's objective is inescapable.

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[21] *Argument of Charles Sumner, Esq., Against the Constitutionality of Colored Schools in the case of Sarah C. Roberts* v. *Boston*, 29-30 (1848).

[22] Even if it could be shown that dual system of education is economically sound, that would not make the practice constitutional.

[23] President's Commission on Higher Education, op. cit. *supra* note 10, Vol. I, at 31.

That even those who believe in segregation recognize it to be wasteful and inefficient can be gleaned from the fact that several southern states in an effort to maintain segregation and yet cut down on excessive duplication are now embarking on an attempt to pool their resources in the establishment of regional graduate and professional schools under a regional compact. See for discussion of this compact (Note), 13 Mo. L. Rev. 280 (1948).

2. *Racial segregation cannot be justified as essential to the preservation of peace and good order.*

All the available data with regard to the admission of Negroes on an integrated basis to public educational facilities of higher learning negates the argument that segregation is required to preserve peace and good order.

The experiences of states with a racial and social policy similar to that of Texas demonstrate that this policy may be abandoned at least at the graduate and professional school level to the advantage of all concerned. The University of Maryland has admitted Negroes into its law school since 1935. Negroes have freely attended the University of West Virginia since 1939. The University of Arkansas in 1947 admitted a Negro to its law school on a segregated basis. Before the term had ended, segregation had been eliminated and now Negroes are attending its law school and school of medicine just like any other students. The University of Delaware is now open to Negroes, as is the University of Kentucky. In September 1949, a Negro was admitted into the University of Texas School of Medicine.[24] In every instance there was considerable initial resistance by governmental officials to the abandonment of segregation. Yet all of these experiments have been beneficial and successful.

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[24] Both the University of Oklahoma and Oklahoma A. & M. College are now open to Negroes but on a segregated basis. For full discussion of the lowering of these barriers, see (Editorial Note), 16 *Journal of Negro Education* 4-6 (1949). See also: Thompson, *Separate But Not Equal. The Sweatt Case*, 33 Southwest Review 105, 111 (1948). Frazier, op. cit. *supra* note 20, chap. 17. There is evidence that a large segment of the southern teaching profession looks with favor on the abandonment of segregated schools. For an interesting article on this point see, Dombrowski, *Attitudes of Southern University Professors Toward the Elimination of Segregation in Graduate Schools in the South*, 19 The Journal of Negro Education 118 (1950).

Moreover, even assuming that the non-discriminatory treatment of petitioner by Texas, which the equal protection clause demands, will disturb public peace, the Court has consistently held that this is not a justification for the denial of constitutional rights to which one would otherwise be entitled.

In *Buchanan* v. *Warley*, 245 U. S. 60, the State of Kentucky attempted to defend an ordinance segregating whites and Negroes into separate residential areas on the ground that otherwise riots and disorder might result. That argument this Court dismissed with this statement:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." (p. 81).

In *Shelley* v. *Kraemer*, 334 U. S. 1, this Court reaffirmed the principle that the preservation of public peace and good order does not suffice to clothe with constitutionality governmental action which effects a classification or distinction based upon race. See also: *Bridges* v. *California*, 314 U. S. 252; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Morgan* v. *Virginia*, 328 U. S. 373; *Thornhill* v. *Alabama*, 310 U. S. 88; *Whitney* v. *California*, *supra*.[25]

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[25] Cf. *Schneider* v. *State*, *supra*, at 161: "Mere legislative preferences or belief respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

3. *There is no rational basis for a legislative assumption that different races have different intellectual potentialities and should therefore be educated in separate schools.*

The practice of segregation has at times been rationalized by the claim that there are inherent differences between the races. This essentially racist view assumes that minorities belong to inferior races, and that racial intermixture results in the degeneracy of the superior race. After an exhaustive study of all scientific data referring to the intellectual capacity of different racial groups, an expert witness testified in the instant case to this effect:

> "The conclusion then, is that differences in intellectual capacity or in ability to learn have not been shown to exist as between Negroes and whites, and further, that the results make it very probable that if such differences are later shown to exist, they will not prove to be significant for any educational policy or practice" (R. 193-194).

One of the leading sociologists in the field of race relations has pointed out: "There is not one shred of scientific evidence for the belief that some races are biologically superior to others, even though large numbers of efforts have been made to find such evidence."[26] Thus there is no rational or factual support for the racist position. The racist premise is completely invalid, and no act of segregation based upon it can be upheld as reasonable.[27]

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[26] Rose, *America Divided: Minority Group Relations In the United States* (1948).

[27] Montague, *Man's Most Dangerous Myth—The Fallacy of Race*, 188 (1945); American Teachers Association, op. cit. *supra* note 18, at 29; Klineberg, *Negro Intelligence and Selective Migration* (1935); Peterson & Lanier, *Studies in the Comparative Abilities of Whites and Negroes*, Mental Measurement Monograph (1929); Clark, *Negro Children*, Educational Research Bulletin (1923); Klineberg, *Race Differences*, 343 (1935).

The fact that Texas singles out Negroes from all other racial groups [28] and directs that they alone shall be segregated, makes this practice even more arbitrary in nature. Cf. *Skinner* v. *Oklahoma*, *supra*. It should be noted in the same connection that the University of Texas Medical School has dropped its color barriers, for the time being at least. Thus, this Court should say of Texas' action what it said about Kentucky's action in *Buchanan* v. *Warley*, *supra*, at page 81:

> "It is the purpose of such enactments, and it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited."

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[28] *Independent School District* v. *Salvatierra* (Tex. Civ. App.), 33 S. W. 2d 790; and *Minerva Delgado* v. *Bastro Independent School District* (decided on June 15, 1948 by United States District Ct. for W. Dist. of Texas) (not officially reported). It was held that school authorities could not segregate pupils of Mexican or other Latin-American descent into separate classes or schools. The basis for these decisions, although not specifically stated must be (1) that segregation by race is unconstitutional; (2) that the school authorities had no specific statutory authority to segregate a racial group unless such a policy as to that group is specifically enacted by the legislature. This was the basis of the decision in *Westminster School District* v. *Mendez*, 161 F. 2d 774 (C. C. A. 9th 1947); or (3) that Mexicans being of the white race could not be segregated under any circumstances.

Whatever the basis for these decisions, the result is that the law in Texas apparently is that Negroes are the only racial group which can be segregated.

4. *State ordained segregation is a particularly invidious policy which needlessly penalizes Negroes, demoralizes whites and tends to disrupt our democratic institutions.*

If the racial factor has no scientific basis, then the ills suffered as a result of racial segregation are particularly invidious. We have set out above the purposes and objectives of education. In light of those definitions, it is clear that segregation is an abortive factor in the full realization of its objectives and purposes.

a. First, segregation prevents both the Negro and white student from obtaining a full knowledge and understanding of the group from which he is separated (R. 194). It has been scientifically established that no child at birth possesses either an instinct or even a propensity towards feelings of prejudice or superiority. These prejudices, when and if they do appear, are but reflections of the attitudes and institutional ideas evidenced by the adults about him.[29] The very act of segregation tends to crystallize and perpetuate group isolation, and serves, therefore, as a breeding ground for unhealthy attitudes.[30]

Secondly, a feeling of distrust for the minority group is fostered in the community at large—a psychological at-

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[29] Park, *The Basis of Prejudice*, The American Negro, the Annals, Vol. 140, pages 11-20 as cited by Frazier, op. cit. *supra* note 20, at 668; Faris, *The Nature of Human Nature*, 354, chapter on *The Natural History of Race Prejudice* (1937).

[30] *Lasker, Race Attitudes in Children*, 48 (1949); Ware, *The Role of the Schools in Education for Racial Understanding*, 13 Journal of Negro Education (1944); Moton, *What the Negro Thinks* (1929); Long, *Psychogenic Hazards of Segregated Education of Negroes*, 4 The Journal of Negro Education, 343 (1935). For an exhaustive study relating to the reaction of Negroes to discrimination and how their reactions affect their relations with whites, see Rose, *The Negro's Morale: Group Identification and Protest*, passim (1949). Johnson, *Patterns of Segregation*, II, *Behavioral Response of Negroes to Segregation and Discrimination* (1943).

mosphere which is most unfavorable to the acquisition of a proper education (R. 195). This atmosphere, in turn, tends to accentuate imagined differences between Negroes and whites. In petitioner's trial in the lower court, an expert witness testified to the effect that "those (imagined) differences are given an appearance of reality by the formal act of separation".[31]

Qualified educators, social scientists, and other experts have expressed their realization of the fact that "separate" is irreconciliable with "equality".[32] There can be no equality since the very fact of segregation establishes a feeling of humiliation and deprivation to the group considered inferior.[33]

b. Probably the most irrevocable and deleterious effect of segregation upon the minority group is that it imposes

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[31] As stated by Myrdal, op. cit. *supra* note 20, at 625: "But they are isolated from the main body of whites, and mutual ignorance helps reinforce segregative attitudes and other forms of race prejudice."

[32] Id. at page 580; Johnson, op. cit. *supra* note 30, at 4, 318; Mangum, Jr., *The Legal Status of the Negro* (1947); Report of the President's Committee on Civil Rights, op. cit. *supra* note 20; Report of the President's Commission on Higher Education, op. cit. *supra* note 10; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology 259-287 (1948).

[33] McWilliams, *Race Discrimination and the Law*, 9 Science and Society No. 1 (1945); 56 Yale L. J. 1051, 1052, 1059 (1947); Bond, *Education of the Negro in the American Social Order* 385 (1934); Moton, op. cit. *supra* note 30, at 99; Bunche, *Education in Black and White*, 5 Journal of Negro Education 351 (1936); Long, op. cit. *supra* note 30, at 336-343; Henrich, *The Psychology of Suppressed People* 52 (1937); Dollard, *Caste and Color in a Southern Town* 269, 441 (1937); Young, *America's Minority Peoples* 585 (1932).

a badge of inferiority upon the segregated group.[34] This badge of inferior status is recognized not only by the minority group, but by society at large. As Myrdal has pointed out:

> "Segregation and discrimination have had material and moral effects on whites, too. Booker T. Washington's famous remark, that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white Southern and Northern observers. Throughout this book we have been forced to notice the low economic, political, legal, and moral standards of Southern whites—kept low because of discrimination against Negroes and because of obsession with the Negro problem. Even the ambition of Southern whites is stifled partly because, without rising far, it is so easy to remain 'superior' to the held-down Negroes * * * "[35]

A definitive study of the scientific works of contemporary sociologists, historians and anthropologists conclusively documents the proposition that the intent and result of segregation are the establishment of an inferiority status. And a necessary corollary to the establishment of this value

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[34] Smythe, *The Concept of "Jim Crow"*, 27 Social Forces 48 (1948): "'Jim Crow' as used in a sociological context thus indicates for a specific social group the Negro's awareness of his badge of inequality which he learns through the operation of a 'Jim Crow' concept in his every day living. This pattern of existence has become so much a part of the nation's social structure that it has become synonymous with the words 'segregation' and 'discrimination', and at times when 'Jim Crow' is indexed some authors have indexed it as a cross reference for these terms."

[35] Myrdal, op cit. *supra* note 20, at 643.

judgment is the deprivation suffered by both the minority and majority groups.[36]

The lawyer, as has been demonstrated above, enjoys a peculiar and important role of leadership and guidance in the community. But a professional man who has received his legal education in a "separate" or "segregated" school must necessarily reflect the attitudes of and bear the psychological scars of the society which has arbitrarily placed upon

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[36] Baruch, *Glass House of Prejudice* 66-76 (1946); Gallagher, *American Caste and the Negro College* 94 (1938): Wherever possible, the caste line is to keep *all* Negroes below the level of the lowest whites. This is the first and deepest meaning of "separate but equal". Page 105: "Not the least important aspect of the caste system is its results in seriously malconditioning the individuals whose psychological growth is strongly affected by a caste divided society. These influences are not limited to the Negro caste. They stamp themselves upon the dominant caste as well"; LaFarge, *The Race Question and the Negro* 159 (1945): "Segregation, as a compulsory measure based on race, imputes essential inferiority to the segregated group. Segregation, since it creates a ghetto, brings in the majority of instances, for the segregated group, a diminished degree of participation in those matters which are ordinary human rights, such as proper housing, educational facilities, police protection, legal justice, employment. * * * Hence it works objective injustice. So normal is the result for the individual that the result is rightly termed inevitable for the group at large"; James, *The Philosophy of William James* 128 (1925): "Properly speaking, *a man has as many social selves as there are individuals who recognize him* and carry an image of him in their mind. To wound any one of these images is to wound him"; Loescher, *The Protestant Church and the Negro* (1948): "(Segregation) is, in itself, an implication of inferiority, an inferiority not only of status but of essence, of being"; Thompson, "Mis-Education for Americans": 36 Survey Graphic 119 (1947): "Education for segregation, if it is to be effective, must perpetuate beliefs which define the Negro's status as inferior, which emphasize superficial differences, or which in any way suggest that the Negro is a lower order of being and therefore should not be expected to be treated like a white person." Page 120: "Mis-education for segregation has deleterious effects on both Negroes and whites. It requires mental and emotional gymnastics on both sides to adjust (or attempt to adjust) to the many logical and ethical contradictions of segregation. The situation is crippling to the personalities of both Negro and white Americans."

him the onus of being "different"—a difference which carries with it the tacit taint of inferiority.[37] The effect upon the community-at-large as well as upon the Negro professional cannot fail to minimize and abort the value that such a person might have in the role of a lawyer and public servant.

c. There is no compensatory value to society as a result of the ills suffered from segregation. As we have pointed out above, segregation in education has produced deleterious effects upon both the majority and minority groups. We have similarly found that the only logical premise upon which segregation *could* be based—*i. e.*, the existence of differences in intellectual ability as between the races—has been completely discredited by scientific studies. It would appear then, that the only remaining rationale for segregation is that although it might be admitted that racial segregation has no validity, the prevailing customs and mores require that segregation be broken down in a gradual manner.[38] However, all available data which refers to instances where segregation *did* exist but was subsequently broken down, controvert this assumption.[39]

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[37] Meikeljohn, *Equality and Education*, radio address given over the Mutual Broadcasting System and published under the auspices of Education for Freedom, Inc. (1943). As Alexander Meikeljohn has said: "If government is carried on by consent of the governed, then every man is a governor * * * And as such, he and his fellow-rulers must be educated for their work as rulers. *But the crucial point is, that since they are all doing the same work, they must have the same education.*"

[38] See (Note), 46 Mich. L. Rev. 639 (1948).

[39] Warner, *New Haven Negroes*, 277 (1940); Blascoer, *Colored School Children in New York* 10 (1915); Thompson, op. cit. *supra* note 24; see also Thompson, *Some Progress in the Elimination of Discrimination in Higher Education in the United States*, 19 Journal of Negro Education 1-6 (1949). See testimony expert witnesses this case.

Since all available evidence controverts the theory that Negroes have an inferior mental capacity to whites, and moreover, since when permitted, the two groups work well together and to their mutual advantage, it must be concluded that any claim of inferiority is motivated solely by a desire to perpetuate segregation *per se*.[40]

It has been demonstrated, we submit, that Texas cannot show any rational relationship between racial segregation and the accomplishment of a legitimate legislative purpose. Therefore, its refusal to admit petitioner to the University of Texas has deprived him of the equal protection of the laws, under the broadest standard with which this Court measures compliance with that constitutional requirement.

B. Under the test applicable to governmental action based upon race and color a denial of admission to the University of Texas to petitioner is a clear and unwarranted deprivation of constitutional rights.

Respondents' action is unconstitutional for an additional reason. By making race and color the sole basis for its refusal to admit him to the University of Texas, Texas has rendered its activities subject to even stricter tests of constitutionality than would ordinarily be the case.

This stricter standard was foreshadowed by the statement of Mr. Justice STONE in *United States* v. *Carolene Products Co.*, 304 U. S. 144, note 4:

> "There may be narrower scope for operation of the presumption of constitutionality when legisla-

[40] McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreement, Covenants or Conditions in Deed is Unconstitutional*, 33 Calif. L. Rev. 5, 27, note 94 (1945): "When a dominant race, whether white or Negro, demands separation, it is fallacious to say * * * that the intention and effect is not to impose a 'badge' of inferiority on the other."

tion appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth • • •

"Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religions (citing cases), or national (citing cases), or racial minorities (citing cases); whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. (citing cases.)"

In subsequent cases this Court has established these suggestions as positive and definitive guides to decision. In *Hirabayashi* v. *United States*, 320 U. S. 81, 100, Mr. Chief Justice STONE said:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Mr. Justice BLACK said in *Korematsu* v. *United States*, 323 U. S. 214, 216:

"All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing

public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."

Thus, at the very least, this Court requires a stronger showing of the *real difference* on which the classification rests, and a more pertinent relationship to the subject matter than is normally the case.[41]

In dealing with racial discrimination, it follows the same pattern which is used in dealing with interferences with liberties protected under the First Amendment. It does not abide by nor accept the judgment of the legislature but must determine for itself whether a violation of the constitutional

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[41] See: *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410, 420; *Oyama* v. *California*, 332 U. S. 633, 640; *Shelley* v. *Kraemer*, 334 U. S. 1, 21, 23. See also: *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 and *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 which, although not directly in point, are links in the development of this principle.

It was on the basis of a national emergency that the Court upheld the relocation policy in *Hirabayashi* v. *United States*, *supra*, and in *Korematsu* v. *United States*, *supra*. But see: *Acheson* v. *Murakami*, 176 F. 2d 953 (C. C. A. 9th 1949). Although the major emphasis of opinion is on the hardship caused, the court implies rather sharply that the relocation policy was not required by any real danger of sabotage but resulted from the belief of General DeWitt in disloyalty by blood which it likened to the doctrines with which Nazis justified the gas chambers of Dachau. See particularly pages 957-958. Apparently, although when first presented with the problem in *Hirabayashi*, *supra*, and companion cases, the Ninth Circuit did not feel that it could look behind the stated military purpose, now with the war emergency past, it is ready to carefully examine and condemn a policy believed to be grounded on racial bias.

guarantee has occurred.[42] Whatever the stated purpose of respondents' action may be, this Court must consider all factors relevant to a determination of its actual and natural effect.[43] The effect here is to deprive petitioner of educational opportunities which white persons enjoy as a matter of course. This is that type of unequal treatment which the Fourteenth Amendment was designed to prevent.

Since Texas cannot justify this practice in terms of any overwhelming public necessity or emergency, we submit that here as in *Oyama* v. *California*, " * * * there is absent

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[42] It is sometimes said that where the governmental action is based upon race or color, there is a presumption of unconstitutionality. See: *Tussman & ten Brock*, op. cit. *supra* note 2; (Notes), 36 Col. L. Rev. 283 (1936), 40 Col. L. Rev. 531 (1940); 41 Yale L. J. (1931); Hamilton & Braden, *The Special Competence of the Supreme Court*, 50 Yale L. J. 1319, 1349-1357 (1941). This appears to be similar to the Court's placement of freedom of speech, press, assembly and religion in a preferred position. See, *e. g.*, *Marsh* v. *Alabama*, 326 U. S. 501, 508; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639; but cf. Mr. Justice FRANKFURTER concurring in *Kovacs* v. *Cooper*, 336 U. S. 77, 89, 95; where he denies that any legislation is presumptively unconstitutional which affects rights protected under the First Amendment. It is his view that "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements". Even under Mr. Justice FRANKFURTER's definition, however, such statutes would be lacking in the presumption of constitutionality which statutes have dealing with economic and social welfare problems. See: (Note) 49 Col. L. Rev. 629 (1949).

[43] See: *Bailey* v. *Alabama*, 219 U. S. 219, 244; *Oyama* v. *California*, *supra*; *Smith* v. *Texas*, 311 U. S. 128; *Pierre* v. *Louisiana*, 306 U. S. 354; *Norris* v. *Alabama*, 294 U. S. 587.

the compelling justification which would be needed to sustain discrimination of that nature."[44]

Thus, under both measurements, the state has subjected petitioner to an unconstitutional deprivation, and the judgment of the court below should be reversed.

C. The fact that states other than Texas require that racially segregated educational facilities be maintained should not influence this Court's interpretation of the equal protection clause.

1. The State of Texas may argue that the question presented here is a matter about which the legislative judgment of the state should be given great weight; that since there are a sizable number of states in which segregated educational facilities are required by law, the Court should not here attempt to impose its judgment as to the propriety of such a policy, on the state.[45] Respondents may also at-

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[44] *Supra*, at 640.

In *Kotch* v. *Bd. of River Port Pilot Commissioners*, *supra*, this Court approved nepotism as a method of handling the selection of pilots in Louisiana. However, the majority opinion made it clear that the peculiar history of piloting made it feel that there was a very real and valid connection between nepotism and the selection of good pilots, which was statute's objective. Mr. Justice RUTLEDGE dissented on the grounds that the selection was based upon blood, which he felt, regardless of its merits as a method, the Constitution condemned.

[45] Separate schools are required by the constitutional and/or statutory provisions of the following seventeen states:

Ala. Const., Art. XIV, Sec. 256, Ala Code, tit. 52, Sec. 93 (1940); Ark. Dig. Stat., Sec. 11535(c) (Pope, 1937); Del. Const., Art. X, Sec. 2, Del. Rev. Code, c. 71, Sec. 2631 (1935); Fla. Const., Art. XII, Sec. 12, Fla. Stat. Ann., Sec. 228.09 (1943); Ga. Const., Art. VIII, Sec. 1, Ga. Code Ann., tit. 32, Sec. 937 (Supp., 1947); Ky. Const., Sec. 187, Ky. Rev. Stat. Ann., Sec. 158.020 (Baldwin, 1943); La. Const., Art. XII, Sec. 4; Md. Code Ann., Art. 77, c. 18, Sec. 192 (Flack, 1939); Miss. Const., Art. VIII, Sec. 207, Miss. Code Ann., Sec. 6276 (1942); Mo. Const., Art. XI, Sec. 3, Mo.

(Footnote continued on p. 36.)

tempt to accomplish the same result by arguing that the problem presented here is similar to the exercise of the legislative judgment in enacting regulatory statutes to meet various economic problems, *e. g.*, *Nebbia* v. *New York*, 291 U. S. 502. It is submitted, however, that experiences of those states which require segregation in public schools are not relevant in determining whether petitioner's constitutional rights have been violated.

The prevailing opinion on the Court is that a claimed right is encompassed in the constitutional guarantee of due process of law if that right is fundamental to and implicit in our concept of liberty. See *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Adamson* v. *California*, 332 U. S. 46. In determining whether there has been a deprivation of due process, the Court sometimes looks to the practices and experiences of the forty-eight states and of other jurisdictions, which have adopted Anglo-American jurisprudence, to see what view prevails as to the right being asserted. See, *e. g.*, *In re Oliver*, 333 U. S. 257. At times in consid-

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(Footnote continued from p. 35.)

Rev. Stat. Ann., Sec. 10349 (1943); N. C. Const., Art. IX, Sec. 2, N. C. Gen. Stat., Sec. 115-2 (1943); Okla. Const., Art. 1, Sec. 5, Okla. Stat., tit. 70, Sec. 455 (as amended Laws 1949, Art. 20, Sec. 9); S. C. Const., Art. XI, Sec. 7, S. C. Code, Sec. 5377 (1942); Tenn. Const., Art. XI, Sec. 12, Tenn. Code Ann., Sec. 2377 (Williams, 1934); Tex. Const., Art. VII, Sec. 7, Tex. Rev. Stat., tit. 49, art. 2900 (Vernon, 1942); Va. Conn., Art. IX, Sec. 140, Va. Code Ann., tit. 11, c. 33, Sec. 680 (1942); W. Va. Const., Art XII, Sec. 8, W. Va. Code Ann., Sec. 1775 (1949). Of this number, however, as indicated *ante*, Arkansas, Delaware, Kentucky, Maryland, West Virginia and Oklahoma have apparently abandoned this policy at the graduate and professional school level. Thompson, *supra* note 24. Whether their action means the permanent abandonment of segregation in graduate and professional schools cannot be predicted. Even Texas has admitted a Negro into the medical college of the state university, evidently as a special exception to the general practice of maintaining segregated schools. In the remaining thirty-one states Negroes are freely admitted into the state colleges, graduate and professional schools.

eration of this provision, the Court may point to the fact that other states have a rule contrary to the one, which petitioner claims is fundamental, as a basis for its refusal to interfere with the legislative judgment. See, *e. g.*, *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Company* (Mr. Justice FRANKFURTER's concurring opinion), 335 U. S. 525.

The Court has approached questions of due process of law in this manner because that concept is relatively fluid and vague, and because of a reluctance to confuse wisdom and desirability with considerations of constitutionality.

Here, however, no such problem is presented. This Court has stated that the due process clause of the Fifth Amendment forbids governmental action directed against a particular minority since governmental classifications based upon race and color are considered arbitrary. *Hirabayashi* v. *United States, supra*, see also *Korematsu* v. *United States, supra; Ex parte Endo*, 323 U. S. 283. In light of this interpretation, we submit that, even in the absence of an equal protection clause, respondents' action would be condemned.

2. Here, however, petitioner is relying upon the equal protection clause of the Fourteenth Amendment. In considering whether a person has been denied equal treatment, the basic inquiry is whether white persons are being afforded the same right, privilege or advantage which the state is denying to Negroes. If a particular state affords its white citizens a particular right or privilege, the equal protection clause requires that that right also be granted to Negro citizens on the same basis.[46]

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[46] Fairman & Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stanford L. Rev. 5, 138-139 (1949); see also: Brief of Committee of Law Teachers Against Segregation in Legal Education, as *amici curiae*, for discussion of intent of the framers of the 14th Amendment on this point.

The Court recognized this in *Strauder* v. *West Virginia*, 100 U. S. 303, 306-307. It said:

> "It [the equal protection clause of the 14th Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law [of the state wherein they reside] are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States * * *
>
> "* * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?"

Here the Court must determine for itself whether the governmental activity complained of results in discriminatory treatment in violation of the Constitution. And the fact that other states may be guilty of the same disregard of the constitutional mandate does not meet the problem.

3. It is further submitted that it would be improper to consider the practices of those states, which like Texas, enforce a pattern of racial segregation at the graduate and professional school level, in any event.

As previously stated, this Court has adopted the view that in economic matters, it has no special competence which would warrant the substitution of its view for that of the legislature. A necessary adjunct to this theory of loosely fettered legislation is that the legislators must be subject to political restraint. To this end it is necessary to have an electorate capable of exerting a corrective force, so that the lack of wisdom of the law makers may be dealt with

through the normal political processes. The belief of the Court is that as long as freedom of expression is not impaired, the electorate will be able to check legislative impropriety.[47] This is the basic reason for the care with which any impairment of freedom of speech is carefully scrutinized, *e. g., Thornhill* v. *Alabama*, 310 U. S. 88.

However, the Court also carefully scrutinizes threats to religious freedom, protected under the same constitutional provision; but on a different basis. Since minority sects or creeds might be incapable of exerting any real corrective force through normal political processes, the constitution protects them in the exercise of their religious beliefs to secure them against the possible hostility of the dominant majority. The equal protection clause was an extension of this constitutional protection to racial minorities. Recognition of this factor is implicit in recent decisions of this Court. *Oyama* v. *California, supra; Takahashi* v. *Fisk & Game Commission, supra; Shelley* v. *Kraemer, supra.*

4. Most of those states, which have traditions and practices similar to Texas in enforcing racial discrimination, refused in 1866 and 1867 to ratify the Fourteenth Amendment, because it was felt, and correctly, that the Amendment would require them to accord to Negroes the same rights accorded to white persons. Those states are Mississippi, Maryland, Kentucky, Texas, Arkansas, Georgia, Florida, North Carolina, South Carolina, Virginia and Delaware.[48]

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[47] Dowling, *Constitutional Law* (1946) explains the Court's philosophy thus:

> "The underlying theory of the court appears to be that if, by striking down interferences in respect to matters of the mind, it can keep the market place of ideas open and the polling booths accessible, it will rely upon the ordinary political processes to prevent abuse of power in the regulation of economic affairs."

[48] See: Fairman and Morrison, *supra* note 46, at 90-95.

5. These same states are among those involved in the long history of litigation before this Court, culminating in *Smith* v. *Allwright*, 321 U. S. 649, because of the relentlessness and recklessness with which they sought to circumvent the guarantees of the Fifteenth Amendment. In spite of the sweeping decision in *Smith* v. *Allwright, supra*, some of these states still hope to avoid bowing to the inevitable. See: *Rice* v. *Elmore*, 165 F. 2d 387 (C. C. A. 4th 1947), cert. denied, 333 U. S. 875; *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala. 1949), cert. denied, 336 U. S. 993; *Baskin* v. *Brown*, 174 F. 2d 391 (C. C. A. 4th 1949).[49] The efforts of these states to avoid compliance with the Fifteenth Amendment is matched by their efforts to avoid adhering to the requirements of the equal protection clause, and the "separate but equal" doctrine is merely a part of this pattern.

6. Further segregation places barriers to free and democratic associations. Therefore, the segregated group is not able to readily influence that segment of the public which is not as vitally concerned with his immediate problem, as, for example, it was indicated that a labor union might be able to do with respect to legislation concerning the validity of the closed shop. See: Mr. Justice FRANKFURTER's opinion in *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Company, supra*. Racial isolation in fact strengthens and accentuates the evils which need to be combatted. Prejudice against racial minorities, as this Court has recognized, creates conditions which tend to discount those processes that ordinarily might be relied upon to protect individuals against arbitrary and unreason-

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[49] See: Key, *Southern Politics in the State and Nation* (1949) for a comprehensive analysis of the effect of *Smith* v. *Allwright*, on the white primary.

able governmental action. See: *United States* v. *Carolene Products Co., supra.*

Any argument that this Court should refuse to measure respondents' action in terms of the limitations of the equal protection clause, therefore, because states other than Texas practice racial discrimination, should be rejected. Respondents have deprived petitioner of the equal protection of the laws in violation of his constitutional rights. For these reasons, it is submitted, the judgment of the Court below should be reversed.

II.

The decision of the court below improperly applies the equal protection clause of the Fourteenth Amendment.

A. The Fourteenth Amendment was intended to protect Negroes against discriminatory state action.

Whatever dispute there may be as to the reach of the Fourteenth Amendment, all agree that one of its primary purposes was to raise the Negro to a status of equality and full citizenship,[50] and that the provision established a national interest in the maintenance of individual freedom from discrimination based upon race or color.[51]

Petitioner places his main reliance upon the equal protection clause. This provision, as we have stated previously, was intended to make certain that all persons similarly situated receive the same treatment, and particularly, that racial differences should not be the basis of governmental action. In this case, petitioner contends that he is

[50] *Strauder* v. *West Virginia, supra*; *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 94.

[51] Lusky, *supra* note 6. See also: Marx, *Effects of International Tension on Liberty Under Law*, 48 Col. L. Rev. 555, 573 (1948).

being treated differently, and to his detriment, in being excluded from the University of Texas solely on account of his race.

B. Respondents contend that racial segregation in conformity to the requirements of the "separate but equal" doctrine affords equal protection.

Respondents contend that the constitution and statutes of Texas require the state to provide legal training for petitioner in a school separate and apart from that maintained for whites. They contend that the equal protection clause may properly be construed as permitting such an arrangement of the state's educational facilities, as long as the separate school is equal to the facilities maintained for whites. Moreover, respondents maintain that equality as between the two facilities need not be mathematically precise, but that the constitution is satisfied when the two facilities are "substantially equivalent".[52] Respondents

[52] This term "substantially equal" has lately been injected as a qualifying limitation of the "separate but equal" doctrine. It is difficult to perceive exactly what this qualification means. For one of the clearest and frankest definitions of the qualification see page 449 this record. There the Texas Court of Civil Appeals said:

> "'Equality' like all abstract nouns must be defined and construed according to the context or setting in which it is employed. Pure mathematics deals with abstract relations, predicated upon units of value which it defines or assumes as equal. Its equations are therefore exact. But in this sense there are no equations in nature; at least not demonstrably so. Equations in nature are manifestly only approximations (working hypothese); their accuracy depending upon a proper evaluation of their units or standards of value as applied to the subject matter involved and the objectives in view. It is in this sense that the decisions upholding the power of segregation in public schools as not violative of the fourteenth amendment, employ the expressions 'equal' and 'substantially equal' and as synonymous."

Evidently what is meant by "substantial equality" is that physical equality to the white school need only be approximated and appears to be an acceptance by the proponents of the "separate but equal" thesis of the inevitability of discrimination under a segregated system.

argue that this is what the Court sanctioned in *Plessy* v. *Ferguson, supra; Hall* v. *DeCuir,* 95 U. S. 485; *Cummings* v. *Board of Education,* 175 U. S. 528; *Chesapeake & Ohio Ry.* v. *Kentucky,* 179 U. S. 388; *Berea College* v. *Kentucky,* 211 U. S. 45; *Chiles* v. *Chesapeake & Ohio Ry.,* 218 U. S. 71; *McCabe* v. *A. T. & S. F. Ry. Co.,* 235 U. S. 151; *Gong Lum* v. *Rice,* 275 U. S. 78; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Fisher* v. *Hurst,* 333 U. S. 147; and that these cases compel affirmance of the judgment of the Court below. In short, respondents argue that these cases have established a principle whose authority has been unaffected by the Court's approach to the general problem of classification, and its more recent treatment of race and color as an irrational and constitutionally irrelevant criterion. In other words, respondents would substitute a judicially coined doctrine or phrase "separate but equal" used as an aid to the interpretation of an early case for the broad language of the Constitution itself:

> "No state shall * * * deny to any person * * * the equal protection of the laws"

in order to restrict the meaning of this provision.

Petitioner contends, on the other hand, that (1) the equal protection clause was carefully phrased in terms of its limitations on the power of state government so as to assure the equal treatment of individuals; (2) that the specific purpose of the Amendment was to prevent covert as well as open discrimination based upon race or color; and (3) that discrimination inevitably results wherever the "separate but equal" doctrine is applied.[53]

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[53] This will be fully discussed in Part III of the brief.

C. The problem with which *Plessy* v. *Ferguson* dealt is fundamentally different from the problem presented here, and that case cannot help this Court in making a proper determination of petitioner's complaint.

In *Plessy* v. *Ferguson*, a Louisiana statute, which required the separation of the races in railroad coach accommodations, was held to be a proper exercise of state authority under the Fourteenth Amendment as long as the facilities provided for Negroes were equal to those provided for whites. It is true that the Court cited several state cases condoning racial segregation in educational facilities, but the decision itself was necessarily limited to the problem before it.

Equality of transportational facilities presents an entirely different question from that of equality of educational opportunities, which is involved here. In transportation, the primary considerations are the type of comfort and convenience, courtesy, fare, speed, time of arrival and departure. In determining whether equality of opportunity has been offered in education, one must consider the learning process, the types of offerings provided, the necessity of education to the development of citizenship, loyalties and devotion to democratic beliefs, and the development of an individual as a personal and national asset; in short the whole function of education in a democracy. This necessarily requires consideration of psychological, sociological and spiritual factors in addition to pure physical measurements. Moreover, even as to transportation the application of *Plessy* v. *Ferguson*, has been considerably curtailed

by *Morgan* v. *Virginia, supra*, and *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28.[54]

It is to be remembered that *Plessy* v. *Ferguson* came to this Court for review of a judgment on a demurrer and that the sole question for consideration was a bare legal proposition as to the extent of state power. When that case was decided, this Court had had no experience in dealing with the type of question raised, and might have believed in all sincerity that assimilation of the Negro in American culture was impossible and that the experiment which the Fourteenth Amendment was launching was liable to end in tragic failure. Experience has since demonstrated that such fears were groundless, and that individual development is determined by opportunity and not by race. In addition, the Court had before it no facts to show that racial discrimination would be the natural result of the application of the "separate but equal" formula, and it presumed that no such discriminatory effect would result. There this Court said at 550, 551:

> "* * * so far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and the traditions of

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[54] We believe that the Court's decision in *Plessy* v. *Ferguson*, even as limited to the subject matter of transportation, was wrongly decided. The pernicious effect of that decision on transportation, as has been stated above, has been considerably curtailed by virtue of *Morgan* v. *Virginia, supra*, and *Bob-Lo Excursion Co.* v. *Michigan, supra*. It is our hope that decision by this Court in *Henderson* v. *United States*, now pending, this term No. 25, will overrule that case.

> the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the 14th Amendment than the Acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislature."

The record in this case, on the other hand, conclusively shows that the separation of the races in Texas with regard to the availability of legal educational opportunities produces inequality of treatment and of opportunity, and that such inequality is a direct concomitant of this separation. Whatever may be the view as to the correctness of the decision in *Plessy* v. *Ferguson*, there are such intrinsic differences between the question dealt with there and those now being raised that it will be of little assistance in determining whether the equal protection clause requires Texas to admit petitioner to the School of Law of the University of Texas.

D. This is not an appropriate case for the application of the doctrine of *stare decisis*.

If *Plessy* v. *Ferguson*, and the other cases cited by respondents are definitive of the law presently applicable to this case, we would urge that they be discarded in light of changed conditions and of the necessity for different rules to meet new conditions. As Mr. Justice DOUGLAS said:

> "The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness,

and through the adapting of others to current facts." [55]

We submit, however, that the cases cited by respondents do not govern this case, and that, therefore, we do not need to meet the problem of the impact of the doctrine of *stare decisis* on the question raised herein.

A discussion of the cases on which respondents rely will demonstrate, we believe, that they have no pertinence to the instant problem.[56]

Cummings v. *Board of Education, supra,* is cited as adopting the "separate but equal" formula in the face of

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[55] Douglas, *Stare Decisis,* 49 Col. L. Rev. 735 (1949).

[56] In citing *Hall* v. *DeCuir, supra; Chesapeake & Ohio Ry. Co.* v. *Kentucky, supra; Chiles* v. *Chesapeake & Ohio Ry. Co., supra,* and *McCabe* v. *A. T. & S. F. Ry. Co., supra,* respondents have gone far afield. Those cases involve problems concerning the impact of state regulations upon the national interest in the free flow of commerce. *Hall* v. *DeCuir, supra,* struck down, as a burden upon commerce, a Louisiana statute requiring the equal treatment of the races by common carriers. Recently, however, in *Morgan* v. *Virginia, supra,* a Virginia statute which required the segregation of the races in interstate commerce was declared unconstitutional for the same reason. And cf. *Bob-Lo Excursion Co.* v. *Michigan, supra,* where the Court permitted the application of a state civil rights statute to a carrier operating in foreign commerce on the ground that although regulating foreign commerce, the activities involved were such a peculiar adjunct of local commerce as to require exceptional treatment. It was further suggested on page 37 that there could be no interference with national interest in the application of a state statute prohibiting racial discrimination since our national policy and policy of Canada were opposed to discrimination based on race. Hence *Hall* v. *DeCuir, supra; McCabe* v. *A. T. & S. F. Ry. Co., supra; Chesapeake & Ohio Ry. Co.* v. *Kentucky, supra;* and *Chiles* v. *Chesapeake & Ohio Ry. Co., supra,* have been stripped almost of any real significance whatsoever. The basic inquiry as to the *Chiles* case is whether it may still be considered as a precedent for authorizing common carriers to segregate the races in interstate commerce under their own private rules and regulations. That question undoubtedly will be decided this term in *Henderson* v. *United States, supra* note 54.

the fact that the Court specifically states that this problem was not before it.

> "It was said at the argument that the vice in the common-school system of Georgia was the requirement that the white and colored children of the state be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings. Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate, and grammar schools, in the management of which the rule as to the separation of the races is enforced. We must dispose of the case as it is presented by the record."[57]

Berea College v. Kentucky, supra, involved the constitutionality of a Kentucky statute which made it unlawful for any person or corporation to operate a school or college which received both Negroes and whites as pupils. This Court upheld the constitutionality of the statute but was careful to state that it was not considering the validity of its application to individuals.[58] Therefore, at most, this decision stands for the proposition that a state may prohibit corporations from accepting students of both races in the same institution without doing violence to the guarantees of the Fourteenth Amendment.[59] Even this proposition now seems questionable. At any rate, there is little doubt that a state may exercise greater power in its dealings with corporations than it is permitted in its relations with an individual.

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[57] At pages 543, 544.

[58] At page 54.

[59] In granting privileges and advantages which it may withhold a state may exact conditions which under ordinary circumstances it would be unable to do. See *Hamilton v. Board of Regents*, 293 U. S. 245.

In *Gong Lum v. Rice, supra*, a Chinese child was denied admission to a white school in her district. She contended that the state could not group her with Negroes for the purpose of determining what public school she could attend. No question was raised concerning the power of the state to adopt and enforce a racial classification.[60] The gravamen of plaintiff's contention was that, if whites had the authority and the power to protect themselves against contact with Negroes, who were regarded as peculiar and inferior beings, then Chinese should have the same privilege.

> "Of course it is the white, or Caucasian race, that makes the laws and construes and enforces them. It thinks that in order to protect itself against the infusion of the blood of other races its children must be kept in schools from which other races are excluded. The classification is made for the exclusive benefit of the law making race. * * *
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> "If there is danger in the association [with Negroes], it is a danger from which one race is entitled to protection just the same as another. The White race may not legally expose the Yellow race to a danger that the dominant race recognizes and, by the same laws, guards itself against * * * "[61]
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> * * * * * * * *
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> "* * * The White race protects itself against conditions that would require social contact [with Negroes]. This, as the Mississippi courts say, to preserve the integrity of the Caucasian race. But has not the Chinese citizen the same right to protection that the Caucasian citizen has? * * * Can we arrogate to ourselves the superior right to so organize the public school system as to protect our racial integ-

[60] Brief of Plaintiff-in-Error filed here at page 14 concedes this authority.

[61] Id. at 9 and 10.

rity without regard to the interests or welfare of citizens of other races?" [62]

* * * * * * * *

"It appears, too, from the discussions in the cases and by the note writers that the courts have taken cognizance of the fact that the [Negro] is not desired as a social equal by the members of the White race, and, therefore, the White race has made its laws with a view to preventing such social contact as would have a tendency to foster social relations and social equality. But this same precaution, taken with respect to its own children, is omitted when it comes to dealing with the children of the other races." [63]

This Court felt that the question raised had been settled by *Plessy* v. *Ferguson*. In that we think it was in error. Mr. Chief Justice TAFT was of the opinion, apparently, that once plaintiff conceded that the state could classify on the basis of race, which petitioner denies in this case, there was no basis for the argument that it could not classify Chinese and Negroes together for the purpose of receiving public educational advantages. At any rate, *Gong Lum* v. *Rice*, cannot be a precedent for the application of the *Plessy* v. *Ferguson* formula in the field of education when that question was not before the Court.

In *Missouri ex rel. Gaines* v. *Canada, supra*, the question presented was whether the State of Missouri had denied to petitioner the equal protection of the laws in excluding him, because he was a Negro, from the only law school maintained by the state. That same question was initially presented to the court below in this case. Although the "sepa-

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[62] Id. at 13, 14.
[63] Id. at 17.

rate but equal doctrine" was mentioned, the Court held only that it was a denial of equal protection to provide educational advantages for whites and deny these advantages to Negroes. That decision is no authority for respondents' contention that the application of the "separate but equal" doctrine to a state's educational system complies with the requirements of the Fourteenth Amendment.

In *Sipuel* v. *Board of Regents, supra*, this Court decided that a state was under an obligation to afford to Negroes whatever educational advantages it offered whites and at the same time. In the argument here, counsel stated that the constitutionality of the state's segregation laws was not an issue in the case. For that reason when an original writ of mandamus was sought in the same case, *sub nom. Fisher* v. *Hurst, supra*, on the grounds that the setting up of a segregated school was a denial of equal protection, the Court refused to consider the question.

In none of the cases, therefore, on which respondents rely has the "separate but equal doctrine" been in fact applied to determine the reach of the equal protection clause in the relationship of a state to the individual. Moreover, in none of these cases has the doctrine been reexamined. There are no precedents, therefore, to which this Court must give weight which hold that the "separate but equal" doctrine is a valid measure of the individual's entitlement to equal treatment with respect to the educational advantages a state offers. Therefore, we are left only with *Plessy* v. *Ferguson*, which, as we have pointed out, did not involve educational facilities, as a precedent for the application of the "separate but equal doctrine" in determining the reach of state power under the limitations of the Fourteenth Amendment. And, it is submitted, that case is not applicable to this problem.

III.

If this Court considers *Plessy* v. *Ferguson* applicable here, that case should now be reexamined and overruled.

We have set out in a preceding section of this brief the reasons for our contention that *Plessy v. Ferguson* is not pertinent to the issues herein raised, and that decision may be reached here without its being considered. However, if the Court should be of a contrary opinion, then, we submit, *Plessy* v. *Ferguson* should be reexamined and overruled.

A. The *Plessy* v. *Ferguson* Court did not properly construe the intent of the framers of the Fourteenth Amendment.

1. *The Court improperly construed the Fourteenth Amendment as incorporating a doctrine antecedent to its passage and a doctrine which the Fourteenth Amendment had repudiated.*

In *Plessy* v. *Ferguson* the Court was required to interpret the recently adopted Fourteenth Amendment. In finding its intent and purpose a method was used which was both unusual and fallacious. A series of state cases, but chiefly *Roberts* v. *Boston*, 5 Cush. (Mass.) 198, were cited as sources for reading the "separate but equal" formula into the Fourteenth Amendment.[64] In that case, decided in 1849, prior to the adoption of the Fourteenth Amendment, a Negro girl contended that Boston authorities could not

[64] Other state cases cited include *People* v. *Gallagher*, 93 N. Y. 438; *Ward* v. *Flood*, 48 Cal. 36; *State, Garnes* v. *McCann*, 21 Ohio St. 210; *Lehew* v. *Brummell*, 103 Mo. 546; *Cory* v. *Carter*, 48 Ind. 337; *Dawson* v. *Lee*, 83 Ky. 49. It is interesting to note that all these states have now abolished segregation in public schools with the exception of Kentucky. Even there, however, Negroes are attending the graduate and professional schools of the University of Kentucky. See Thompson, *supra*, note 24.

require her to attend a segregated school.[65] The Supreme Court of Massachusetts held that her exclusion from the regular school did not violate any of her rights under the state constitution, since the city had made provision for her education at a separate school equal to the school maintained for whites. This case is the basic source for the finding in *Plessy* v. *Ferguson* that the Fourteenth Amendment condoned racial segregation on a "separate but equal" basis.

It should be remembered that when *Roberts* v. *Boston, supra,* was decided, it was believed that Negroes were inferior sub-human beings who could never be equal to whites, and Mr. Chief Justice TANEY in *Scott* v. *Sandford,* 19 How. 393, wrote that belief into the fundamental law.[66]

The Thirteenth, Fourteenth and Fifteenth Amendments repudiated the Dred Scott decision. These constitutional provisions were primarily intended to raise the Negro to a status equal to that of whites, to free and protect him from any stigma, degradation or discrimination which his race, color or previous condition of servitude might otherwise invite. *Strauder* v. *West Virginia, supra.* Yet in interpreting one of the constitutional provisions defining this new status, the *Plessy* v. *Ferguson* Court looked for its intent and meaning in a pre-Fourteenth Amendment philosophy—a philosophy which the new Amendment specifically repudiated.[67] Since these were new rights which had

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[65] Her attorney was Charles Sumner, later one of the persons chiefly responsible for drafting and steering through Congress the Thirteenth, Fourteenth and Fifteenth Amendments and Civil Rights Legislation passed thereunder.

[66] Historians credit this decision as one of the causes of the Civil War. See: Frazier, op. cit. *supra* note 20.

[67] See Cong. Globe, 42nd Cong., 2d Sess. 3261 (1872); Cong. Globe, 43rd Cong., 1st Sess. 4081, 4082, 4116 (1874).

been created, the intent of the framers of the Thirteenth, Fourteenth and Fifteenth Amendments should have been the primary sources for determining their meaning and purpose. Had this method been followed, modern scholars are of the opinion that the Court would necessarily have concluded that the "separate but equal" doctrine was directly contrary to objectives which the Fourteenth Amendment was mean to accomplish.[68]

2. *The framers of the Fourteenth Amendment and of the contemporaneous civil rights statutes expressly rejected the constitutional validity of the "separate but equal" doctrine.*

This Court often recognizes the pertinence and value of an analysis of the intent of the framers of constitutional and statutory law in aid of their interpretation and application.[69]

Accordingly, it is appropriate in reevaluating the "separate but equal" doctrine as enunciated in *Plessy* v. *Ferguson* to refer directly to the official statements of the men who were responsible for the drafting of the Fourteenth Amendment and the legislation passed shortly thereafter to implement it.

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[68] The brief on the merits of the Committee of Law Teachers Against Segregation in Legal Education filed as *amici curiae* in this case does a careful and comprehensive analysis of the question. It is their conclusion that the framers of the Fourteenth Amendment meant to prohibit segregation. *Tussman & ten Broek, supra* note 2, at 342, 356, *et seq.*, indicate that they have reached the same conclusion. See also: (Note), 49 Col. L. Rev. 629 (1949) to the same effect. Needless to say we believe that Mr. Justice HARLAN'S dissent in *Plessy* v. *Ferguson* was the correct approach to the question.

[69] See, *e. g., United States* v. *American Trucking Assn.*, 310 U. S. 534; *The Church of the Holy Trinity* v. *United States*, 143 U. S. 457. See also: Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527 (1947).

It became clear shortly after the ratification of the Thirteenth Amendment that it was too limited in scope to insure that the Negro would be able to achieve the equality and freedom from discrimination which were among its major purposes.[70] The Congress in 1866 set about combatting the so-called Black Codes enacted by the southern states, which limited the rights of Negroes to own property, institute law suits, testify in any proceedings, and imposed more severe penalties on Negroes than on whites for the same offenses. This legislative effort culminated in the Civil Rights Act of 1866, but in the process of its enactment the Congress became involved in a complicated semantical debate over the meaning of the term "civil rights". The bill itself emerged as a specific corrective only to certain named abuses and failed to resolve the general problems of equality and segregation.[71]

Eventually, it became apparent through the debates on the Civil Rights Act of 1866 that a new constitutional amendment was necessary to eliminate all "discrimination between citizens on account of race or color in civil rights".[72] To avoid the interpretative refinements of "civil rights" which had plagued the Congress, the more comprehensive "equal protection of the laws" was used as the key phrase for the statement of the basic principle.

Little can be found in the congressional debates relating to the Amendment itself which throws any light on the questions of interpretation here involved. The Amendment passed both houses easily. But the fifth section of the Amendment authorized implementary legislation, and by the time the Amendment was ratified new waves of discriminatory state legislation throughout the South required

[70] Flack, *The Adoption of the Fourteenth Amendment*, Ch. 1 (1908).

[71] Id., pages 21, 25, 29.

[72] Cong. Globe, 39th Cong., 1st Sess., 1290, 1293 (1866).

the 42nd Congress to face the task of shaping new practical statutory remedies. The extended debates of this Congress and of its successor, which finally carried through the passage of the Civil Rights Act of 1875,[73] are of great value in ascertaining the contemporary views and the "constitutional intent" of the men who drafted the Amendment.[74] The public statements of these men are particularly persuasive in respect to the "separate but equal" doctrine, for this question was clearly presented, extensively debated, and conclusively resolved in these hearings. If *Plessy* v. *Ferguson, supra*, is the foundation of the theory of civil rights which holds that a Negro is afforded the equal protection of the laws if he gets merely a technical, segregated "equality", then it is highly relevant here to go behind that decision in order to demonstrate that the men who were responsible for the Fourteenth Amendment and its accompanying legislation expressly rejected the theory and all of its implications.

The bill sponsored by Senator Sumner of Massachusetts was primarily concerned with the prohibition of discrimination in conveyances, inns, theatres and schools. By its language it was explicit that no segregation, no separation of these facilities was to be countenanced. It was pointed out many times that the bill did not permit the establishment of separate facilities even though they might be "equal".

Senator Sumner said:

> "Then comes the other excuse, which finds Equality in separation. Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the

[73] The bill passed the Senate on February 27, 1875, by a vote of 36 to 26, and was approved by the President on March 1st. See Flack, op. cit. *supra* note 70, at 277.

[74] See Fairman and Morrison, *supra* note 46.

artificial substitutes for Equality; and this is the contrivance by which a transcedent right, involving a transcendent duty, is evaded * * * Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instance with the spirit of Slavery, and this decides its character. It is Slavery in its last appearance."[75]

Senator Pease of Mississippi at a later date, shortly before the bill was passed in the 43rd Congress, states in unequivocal terms:

"The main objection that has been brought forward by the opponents of this bill is the objection growing out of mixed schools. * * * There has been a great revolution in public sentiment in the South during the last three or four years, and I believe that today a majority of the southern people are in favor of supporting, maintaining, and fostering a system of common education. * * * I believe that the people of the South so fully recognize this, that if this measure shall become a law, there is not a state south of the Mason and Dixon's line that will abolish its school system. * * * I say that whenever a state shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made it is a distinction the intent of which is to foster a commitment of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that 'because you are a black man you shall have a separate school,' he looks upon that, and justly, as tending to degrade him. There is no equality in that.

" * * * because when this question is settled I want every college and every institution of learning in this broad land to be open to every citizen, that there shall be no discrimination."[76]

[75] Cong. Globe, 39th Cong., 1st Sess., 382, 383 (1865).
[76] Cong. Globe, 43rd Cong., 1st Session, page 4153 (1874).

In the course of these discussions of the "separate but equal" doctrine its proponents urged upon their colleagues various state court decisions which had followed it, viz., *Roberts* v. *Boston* and *State*, *Garnes* v. *McCann*, *supra*. These cases were expressly rejected as unsound and inconsistent within the meaning and purpose of the equal protection clause.[77] Yet these are the decisions which form the principal judicial foundation for this Court's decision in *Plessy* v. *Ferguson*.

By a vote of 26 to 21 the Senate of the 42nd Congress concluded that "separate but equal" schools, if established under the aegis of the state or by force of state law, were a violation of the Fourteenth Amendment. This judgment, since it came from the men who best knew why the Amendment was drafted and what they intended it to accomplish, should be highly persuasive. It should certainly cast doubt upon the soundness of the *Plessy* decision.

These Senators of 1874 and 1875 are among the most cogent and eloquent advocates of the petitioner's cause in this Court.[78] In rejecting the "separate but equal" theory,

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[77] See Cong. Globe, 42nd Cong., 2nd Sess. 3261 (1872); Cong. Globe, 43rd Cong., 1st Sess. 4081, 4082, 4116 (1874).

[78] This is what the Bill meant to Senator Howe of Wisconsin. Cong. Globe, 43rd Cong., 1st Sess. 4147 (1874):

> "* * * the simple justice of the provisions of this bill is self-evident.
>
> "What are they? A command is proposed that no citizen of the United States shall be excluded from the accommodations of inns, of public highways, of public schools, nor shall their remains be excluded from resting in public burial grounds notwithstanding they are black. That is all. A national decree is proposed that a citizen shall have the right to travel along the public thoroughfares if he pays his fare, and shall have a right to send his children to the public schools if he meets the charges, although he is not white. That is all. It lays not an ounce of weight upon any man of color but it lifts burdens from some. That is the bill."

Senator Boutwell explained why the concept itself was a contradiction in terms, and a practical impossibility:

> "* * * To say, as is the construction placed upon so much of this bill as I propose to strike out, that equal facilities shall be given in different schools, is to rob your system of public instruction of that quality by which our people without regard to race or color, shall be assimilated in ideas, personal, poltical, and public, so that when they arrive at the period of manhood they shall act together upon public questions with ideas formed under the same influences and directed to the same general results; and therefore, I say, if it were possible, as in the large cities it is possible, to establish separate schools for black children and for white children, it is in the highest degree inexpedient to tolerate such schools. * * * And inasmuch as we have in this country 4,000,000 colored people, I assume that it is a public duty that they and the white people of the country with whom they are to be associated in public affairs shall be assimilated and made one in the fundamental idea of human equality. Therefore, where it would be possible to establish different schools, I am against it as a matter of public policy.
>
> "But throughout the larger part of the South it is not possible to establish separate schools for black children and for white children, that will furnish means of education, suited to the wants of either class; and therefore in all that region of the country it is a necessity that the schools shall be mixed in order that they shall be of sufficient size to make them useful in the highest degree; and it is also important that they should be mixed schools, in order that the prejudice which now pervades portions of our people shall be uprooted by the power of general taxation."[79]

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[79] Cong. Rec. 4158, 43rd Cong., 1st Sess. (1874).

Senator Frelinghuysen searched the underlying principles of our government in replying to his opponents:

"If it be asked what is the objection to classification by race, separate schools for colored children, I reply, that question can best be answered by the person who proposes it asking himself what would be the objection in his mind of his children being excluded from the public schools that he was taxed to support on account of their supposed inferiority of race.

"The objection of such a law on our part is that it would be legislation in violation of the fundamental principles of the nation.

"The objection to the law in its effect on society if that 'a community is seldom more just than its laws;' and it would be perpetuating that lingering prejudice growing out of a race having been slaves which it is as much our duty to remove as it was to abolish slavery.

"Then, too, we know that if we establish separate schools for colored people, those schools will be inferior to those for the whites. The whites are and will be the dominant race and rule society. The value of the principle of equality in government is that thereby the strength insures to the benefit of the weak, the wealth of the rich to the relief of the poor, and the influence of the great to the protection of the lowly. It makes the fabric of society a unit, so that the humbler patrons cannot suffer without the more splendid parts being injured and defeated. This is protection to those who need it. And it is just that it should be so; for of what value is the wealth and talent and influence of the individual if you isolate him from society? Great as he may be, he is the debtor to society. Let him pay.

"Sir, if we did not intend to make the colored race full citizens, if we propose to place them under the ban of any legalized disability or inferiority, and

there to hold them, we should have left them slaves." [80]

One Senator prophesied that under the "pretense of what is called equality" the result would be to "grind out every means of education that the colored man can have". [81] This same fear was echoed by Mr. Justice HARLAN in his dissenting opinion in *Plessy* v. *Ferguson*. [82]

The provision with respect to schools was finally deleted from the bill in the House, but this was done as a matter of policy and political expediency. The House merely chose to withhold criminal sanctions with respect to the maintenance of segregated schools—it neither *approved* such segregation nor did it hold that separate schools were permissible under the Fourteenth Amendment. It merely left this aspect of segregation and discrimination to the courts.

For purely practical reasons some of the representatives felt that the Negro's chances of obtaining good common schools would be better under the Court's protection than under the proposed remedial legislation. [83] Unfortunately *Plessy* v. *Ferguson* infused the 14th Amendment with a meaning which was at odds with the intent of its framers. [84]

An historical analysis of the intent of those men of the 43rd Congress, who drafted and molded the enforcement acts of the Fourteenth Amendment, clearly indicates that the constitutional hypothesis of "separate but equal" as-

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[80] Id., at 3452.

[81] Cong. Rec. 4173, 43rd Cong., 1st Sess. Mr. Edwards of Vermont.

[82] *Plessy* v. *Ferguson*, *supra*, at 552.

[83] 3 Cong. Rec. 997-998, 43rd Cong., 2d Sess. (1875).

[84] Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 N. Y. U. L. Q. Rev. 16, 75 (1938); Buck, *The Road to Reunion* (1937).

established in *Plessy* v. *Ferguson*, should not be extended to the field of education—particularly at its most vulnerable point—the professional level. We submit, therefore, that it should be overruled.

B. Even comparative physical equality is not possible under a system of enforced segregation.

This Court has never held, as respondents infer, that there is an irrebuttable presumption of validity to segregation statutes. On the contrary, as we have already shown, this Court declared that governmental action which results in discrimination based upon race and color is violative of Constitutional guarantees in the absence of some overwhelming public necessity, *Oyama* v. *California*, *supra*. This record is replete with evidence disclosing the discriminatory consequences of the application of the "separate but equal" doctrine. Where the treatment accorded petitioner is admittedly inferior to and different from that accorded to other persons similarly situated, equality of such treatment can not be assumed, but must be affirmatively determined.

In the seventeen states—Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia and the District of Columbia—where segregation is practiced, it is a matter of public knowledge that the Negro schools are not equal to the white schools. This fact has been graphically demonstrated in the appendix to our petition and brief for writ of certiorari.

But a word in summary needs to be said at this time. In those states there are 39 publicly supported institutions devoted to the higher education of the Negro; while there are 192 public colleges and universities for whites. Negroes

are approximately 22.3 per cent of the total southern population, but they have 16.9 per cent of the total number of public institutions and comprise only 10.3 per cent of those benefiting by the existence of such schools. Only 5.5 per cent of all expenditures for public institutions in the South were for Negro colleges and universities.[85]

Southern Negroes constitute 7.7 per cent of the total population of the United States; southern whites 26.7 per cent. The South spends 22.3 per cent of the total national sum spent for institutions of higher learning. Negroes get 1.8 per cent of this amount, whereas whites receive 20.5 per cent. Per capita expenditure for whites is $4.28; while that for Negroes is $1.32.[86] If expenditures were equalized on a per capita basis, $19,000,000 more per year would be required in higher education alone.

Whereas 16 per cent of all white public intsitutions are accredited by the Association of American Universities,

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[85] See Hearings Before Subcommittee on Appropriations, House of Representatives, 80th Congress, February, 1947, for testimony of Dr. Mordecai W. Johnson, President of Howard University, where he said: "In states which maintain the segregated system of education there are about $137,000,000 annually spent on higher education. Of this sum $126,541,795 (including $86,000,000 of public funds) is spent on institutions for white youth only; from these institutions Negroes are rigidly excluded. Only $10,500,000 touches Negroes in any way; in fact, as far as state supported schools are concerned, less than $5,000,000 directly touches Negroes * * * The amount of money spent on higher education by the state and federal government for Negroes within these states is less than the budget of the University of Louisiana (in fact only sixty-five per cent of the budget) which is maintained for a little over 1,000,000 people in Louisiana. That is one index; but the most serious index is this: that this little money is spread over so wide an area and in such a way that in no one of these states is there anything approaching a first-class university opportunity available to Negroes."

[86] The Educational Directory, 1946-47, Vol. III, page 7. 16th Census: 1940, Population, 2nd Series, U. S. Summary, page 47. *The Journal of Negro Education*, Summer, 1947, page 408. U. S. Office of Education, Statistics of Higher Education, 1943-44, page 70.

only 5.1 per cent of all Negro public institutions are similarly accredited. Of all white public institutions, 25.6 per cent are accredited only by state departments of education while 33.3 per cent of the Negro institutions are similarly accredited.[87] There are 18 law schools, 15 medical schools, 5 colleges of dentistry, 26 schools of engineering, and 13 schools of pharmacy for whites which are accredited. Except for the schools and colleges of Howard University, which is federally supported, there is not one Negro publicly supported graduate or professional school in the country which has received full accreditation.[88]

"Whatever other inferences may be drawn from the facts * * * one of the most important and inevitable conclusions is that Negroes in the separate school systems of the states which require racial segregation have been the victims of gross discrimination in the provision of educational opportunities * * *."[89] The evidence is conclusive that at the graduate and professional school level, there is absolutely no comparative physical equality between the institutions available for whites and those for Negroes.[90] Whatever virtues the "separate but equal" doctrine may

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[87] The Educational Directory, 1946-7.

[88] The Accrediting Agencies: Law—The American Bar Association; Medicine—The American Medical Association; Dentistry—The Council of Dental Education of the American Dental Association; Engineering—The Engineers Council for Professional Development; Pharmacy—The American Council on Pharmaceutical Education, Inc. The states included in this listing are: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. The Law School for Negroes of Lincoln University, Missouri, has been provisionally accredited by the American Bar Association.

[89] Thompson, 16 *The Journal of Negro Education*, 265 (1947).

[90] A Report of Elmo Roper for the Committee on a Study of Discriminations in College Admissions, *Factors Affecting the Admission of High School Seniors to College* (1949)—a comprehensive study showing the extent of discrimination in college admissions.

have in theory, in application it has inevitably resulted in discriminatory treatment. As such that doctrine denies the equal protection of the laws. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

These facts lead to the conclusion that equality, within the meaning of the Fourteenth Amendment, can never be realized under a system of segregation. As one eminent authority, Dr. Alain Locke, stated:

> "In the first place few if any communities can afford the additional expense of entirely equal accommodations, and it would require as much and the same kind of effort as the removal of the social bias of the community and the reform of its conscience to secure general admission of the principle of complete equity as to secure the abolition of the dual system. Up to a certain point, communities will pay a price for prejudice, but not such an exhorbitant price as complete economic equality requires. Assuming that such parity could be reached and consistently maintained, the moral damage of the situation of discrimination would still render the situation intolerable. But the argument can and will doubtless be settled or fought out on the practical plane of the school budget. Whenever the standards of Negro public schools are raised to the point that the budget expense approaches parity, there will be less resistance to educational segregation, for one of the main but concealed reasons for discrimination lodges in the idea that the Negro is not entitled to the same educational facilities as the white community." [91]

In actuality, states operating under the "separate but equal" doctrine have always attempted to prevent this Court from reviewing its consequences. See *Missouri ex rel.*

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[91] Locke, "Dilemma of Segregation", 4 *Journal of Negro Education*, 407-409.

Gaines v. *Canada*, and *Sipuel* v. *Board of Regents*; See also Brief of respondents in opposition to petition for certiorari. In addition, the doctrine has been misconstrued as raising a procedural barrier to test the constitutionality of separate schools (R. 445). The records in the cases eventually reviewed here have uniformly disclosed a total disregard of even the minimum requirements of the "separate but equal" doctrine. See *Gaines* case and *Sipuel* case, *supra*.[92]

In all cases where the Court has been presented with facts which purported to demonstrate that equality had been achieved in the spacial separation of the races, the Court has declared that the equal protection clause has been violated. *Buchanan* v. *Warley*, *supra*; *Shelley* v. *Kraemer*, *supra*.

Since *Plessy* v. *Ferguson*, we have fought two World Wars for the preservation and maintenance of democracy, and have become a signatory of the United Nations Charter which provides that there shall be no discrimination based on race, creed or color.[93] This Court now recognizes and accepts as one of its primary responsibilities—the protection of minority groups against governmental discrimination based upon considerations of race or color. *Hirabayashi* v. *United States*; *Shelley* v. *Kraemer*; *Takahashi* v. *Fish and Game Commission*; *Oyama* v. *California*.

Whatever reasons may have caused the Court to adopt the "separate but equal" formula in *Plessy* v. *Ferguson*, the whole history of its application conclusively proves that

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[92] In neither the *Gaines* case nor the *Sipuel* case was there any provision at all made for the legal education of Negroes, even in a segregated institution, until the decision by this Court. In this case, although respondents have relied upon the "separate but equal" doctrine *ab initio*, no efforts were made to offer petitioner any type of legal facilities until almost two years after the institution of this action.

[93] Articles 55 and 56.

it has not, does not and cannot provide the equal protection which the 14th Amendment sought to secure.

The fact that physical equality has not resulted, when the "separate but equal" doctrine has been applied, is no accident. Segregation is grounded in a belief in Negro inferiority. Recognizing this fact, social science experts are in universal agreement that segregation and racial discrimination are necessarily one and the same.

IV.

This record discloses the inevitability of discrimination under the "separate but equal" formula.

A. Negro and white college and graduate school facilities in Texas.

Dr. Charles H. Thompson, an authority in education whose unexcelled qualifications as an expert witness are amply set forth in the record (R. 229-233), made a documented, scientific study of the comparative educational facilities for Negroes and whites in Texas at petitioner's request (R. 233-4). Analyzing the situation on the basis of the best recognized criteria, Dr. Thompson found, in substance, as follows:

1. *Physical Facilities.*

The combined asset value of the plant facilities of the thirteen white state-supported schools above the high school level was in excess of $72,000,000; that of Prairie View, the only Negro school of "higher learning", was slightly more than $4,000,000 (R. 239 and 241). This is less than half of the proportionate amount which would be allocated on the basis of the Negro population of the state. Although we believe such a standard to be as pernicious as the "sepa-

rate but equal" doctrine itself, it would seem that this at least would be the minimum requirement of the doctrine. On a per capita basis, $28.66 was invested in plant assets for every white person; $6.40 for every Negro (R. 241). The per student appropriation at Prairie View is much less than that found to exist at a small white teachers college (R. 249). Texas provided through state-supported four-year institutions for 66.8 per cent of its white college students, but for only 31.8 per cent of the Negro students (R. 252).

2. *Current Expenditures.*

In 1943-44, $11,071,490 in state, county and district funds was appropriated for higher education in Texas. The amount of $10,858,018 was appropriated to white institutions, *i. e.*, $1.98 per capita to every white citizen. The sum of $213,472 was appropriated to Negro schools, or 23 cents per capita. The white institutions thus received 8.06 times more funds than were allocated to the Negro institutions (R. 246).

3. *Curriculum.*

In Texas there are 106 undergraduate fields of specialization in the white state-supported institutions, and only 49 in the Negro institution, Prairie View (R. 255). Texas A. & M., a white state-supported institution, has 45 departments of specialization as compared with 13 at Prairie View, a ratio of more than 3 to 1. On the other hand, a number of trade courses on the high school level are given at the Negro university, Prairie View, such as mattress making, auto mechanics, carpeting, laundering, and dry cleaning (R. 255). These skills are usually taught in high schools or vocational schools of secondary school rank (R. 356). On the graduate level, the investigation reveals that a total of

159 Negroes received graduate degrees during approximately a five-year period, as contrasted with some 3,000 white students (R. 257). Moreover, the range of subjects in white graduate schools is considerably wider (R. 257). Dr. Thompson stated:

> "The National Survey of Higher Education for Negroes, to which I have referred, a U. S. Office [of Education] publication, indicated in 1942 that the Texas state supported higher institutions for whites offered graduate work in 65 fields and 5 for Negroes" (R. 257).

The University of Texas, at the present time, gives ten different types of graduate degrees in forty fields. Prairie View gives a Master's Degree in thirteen fields (R. 257). White institutions gave 212 doctorates (R. 258). No Negro institution is qualified to give any degrees at this level.

4. *Faculty.*

In comparing the faculty of white and Negro schools of higher learning in Texas, Dr. Thompson stated that two key factors must be considered, namely, salary and training (R. 261). In order to attract and retain a good teaching staff, faculty members must be paid good salaries and find the working conditions satisfactory. Dr. Thompson's study disclosed that twenty-five teachers were lost to other institutions within the past five years because of the inability of Prairie View to match their salary offers (R. 262). It further revealed that the median salary of a full professor at Prairie View is $2,025, while the lowest salary paid to a full professor in a state-supported white college is $2,700 (R. 262).

As to training, the picture is the same. In 1945-46, only 9.3 per cent of the faculty members of Prairie View had degrees on the doctorate level (R. 263).

5. *Library.*

The University of Texas Library had 750,974 titles. Prairie View had 25,000. Even a white college, such as East State Teachers College with a smaller student body (1,205 students as compared to Prairie View's 1,619), had 81,974 volumes in 1945-46 (R. 264). The library of the Negro College was found by an impartial survey committee to be inadequate even for undergraduates, not to speak of its complete inability to meet the needs of graduate students (R. 265).

6. *Standing in the educational world and community.*

Prairie View is not accredited by The Association of American Universities nor by any of the national professional councils (R. 266). It is regarded as a "poor college"; it is not a "real university" (R. 267). Three white state institutions are accredited by The Association of American Universities (R. 266).

A Negro student at Prairie View cannot get the type of undergraduate or graduate education that is available to the white student of the state. Since this case was started, Texas has established at Houston the University for Negroes. The disparities which Dr. Thompson's study revealed may not now be accurate as to specific detail. It is submitted, however, that the picture remains the same although its contours may have varied somewhat.

In the face of these facts Texas cannot now be heard to say that it has provided "separate but equal" college and graduate school facilities for Negroes. Even the testimony for respondents concedes this to be true.

Dean Pettinger, a witness for respondents who has studied educational facilities for Negro and white students

in Texas for thirty years, stated: "I am unable to think for the moment of [any] colored institutions and white institutions which do have equal facilities with which I have been associated" (R. 333).

B. The two law schools compared.

The picture at the law school level is no brighter. When petitioner applied for a legal education the only law school in existence maintained by the State of Texas was the one at the University of Texas (R. 425).

The University of Texas has been in existence since the last century. The law school has been in existence for more than fifty years and is recognized and accredited by every association in the field (R. 90-91). The Negro school had just been opened in March, 1947 and was not accredited by any agency (R. 25, 96).

1. *Physical plant.*

The proposed Negro law school was to be set up in the basement [94] of a building in downtown Austin consisting of three rooms of moderate size, one small room and toilet facilities (R. 36). There were no private offices for either the members of the faculty or the dean. The space for this law school had been leased for a period from March to August 31, 1947 at $125 a month, and the authorities were negotiating for a new lease after that period (R. 41). It was freely admitted that "there is no fair comparison in monetary value" between the two schools (R. 43). There was no assurance as to where the proposed law school would be located after August 31st, and it was not even certain as to what city it would be in after August 31st (R. 52-53).

[94] Pictures of the building of the Law School at the University of Texas and the basement quarters of the so-called Negro Law School appear in the record at pages 385-387 and 389.

2. *Library.*

While the law school at the University of Texas had a well-rounded library of some 65,000 volumes (R. 133), the proposed Negro school had only a few books, mostly case books for use of first-year students (R. 21-22). However, the students at the proposed law school for Negroes had access only to the law library in the state capitol directly across the street, a right in common with all other citizens of the State of Texas (R. 45). A library of approximately 10,000 volumes had been requisitioned on February 25, 1947 (R. 40), but was not available for use at the time of the trial of this case (R. 44). The University of Texas law school had a full-time, qualified and recognized law librarian with two assistants (R. 139). The Negro law school had neither librarian nor assistant librarians (R. 74, 80, 128).

It was admitted that the library at the state capitol, a typical court library and not a teaching library, was not equal to the one at the University of Texas, and did not meet the standards of the Association of American Law Schools (R. 134, 138, 145). It was also admitted that even if the requisitioned books were actually obtained the library would not then be equal to the library already in existence at the law school of the University of Texas (R. 151).

3. *Faculty.*

The University of Texas Law School has a faculty consisting of sixteen full-time and three part-time professors (R. 369-371). The proposed faculty for the Negro school was to consist of three professors from the University of Texas who were to teach classes at the Negro school in addition to their regular schedule at the University of Texas (R. 59, 84, 87).[25] The comparative value in the difference be-

[25] It was also shown that offices for the dean and faculty members involved were to remain at the University of Texas (R. 46-47).

tween full-time and part-time law school professors was freely acknowledged, and it was admitted that the proposed "faculty" did not meet the standards of the Association of American Law Schools (R. 59, 91-92).

4. *Student body.*

There were approximately eight hundred fifty students at the law school of the University of Texas (R. 76). From the record it appears that all qualified students other than Negroes were admitted. There were no students at the proposed Negro school at the date of opening nor at the time of the trial (R. 162). Although several Negroes had made inquiry concerning the school, none had applied for admission (R. 162). If petitioner had entered this school he would have been the only student.

The law school of the University of Texas had a moot court, legal aid clinic, law review, a chapter of Order of the Coif, and a scholarship fund (R. 102-105). None of these were present or possible in the proposed Negro law school, and Charles T. McCormick, dean of the two law schools, testified that he did not consider these to be factors material to a legal education but rather, that they were "extraneous matters" (R. 106).

Thus Texas has provided all the facilities at the University of Texas which are essential to achieving the objectives of a modern law school, and the Negro law school can in no way be said to be equal or substantially equal to this school.

When we examine the concept "equally" semantically, we find that it is a purely relative term. One cannot compare a state-supported law school, whose student body is composed solely of Negroes, to a state-supported law school whose student body includes various groups (with the ex-

ception of Negroes)—whose study of the law is benefitted by a mutual interchange of ideas and attitudes. Even if, for the sake of argument, the physical facilities offered at both schools *were* the same, "not even the most mathematically precise equality of segregated institutions can properly be considered equality under the law".[96]

It is no accident, no coincidence, that whenever segregation is decreed and enforced, you will find inequality. The facts are, as we have indicated, that in the state of Texas as well as in the other 16 states and the District of Columbia, discrimination and inequality in education, follow inevitably and inexorably from the mere fact of segregation. We have demonstrated above that the psychological effects of a segregated professional education are harmful to the segregator and segregatee alike, because in addition to the inferior educational opportunities offered at the "separate" school—the very fact of separation lessens their value or "social location".

In regard to the measurable physical aspects of professional education, the record has shown that gross inequalities exist whenever segregation is practiced. Similarly, social scientists have attested to the psychological and social ills which result from enforced racial segregation.[97] The results of authoritative studies prepared by educators, psychologists, legal scholars and social scientists are all in agreement with petitioner's contentions that *there can be no separate equality.*

---

[96] Report of the President's Committee on Civil Rights, *To Secure These Rights* 82 (1947).

[97] For an exhaustive study of a cross-section of veterans living in a large American city with regard to how environmental factors are associated with hostility towards minority groups see: Bettleheim and Janowitz, *Dynamics of Prejudice*, A Psychological and Sociological Study of Veterans (1950) passim.

Conclusion

Historically, the prevailing ideology of our democracy has been one of complete equality. The basic law of our land, as crystallized in our Constitution, rejects any distinctions made by government on the basis of race, creed, or color. This concept of true equality has become synonymous with what is generally defined as "the American Creed". Moreover, this creed has become a symbol of hope for people everywhere.

In petitioner's state of Texas, the educational facilities available to him are governed by the "separate but equal" doctrine. He is asked to believe, in spite of the overwhelming evidence to the contrary, that he can secure "equal" educational opportunities in a school set apart from his fellow citizens. For him, the American Creed is but an attractive idea—not a reality.

Education is not a passive concept. The acquisition of information and special skills, transmitted through the medium of education, enables a citizen to live intelligently as well as productively. To the extent that petitioner is in any way denied the same educational facilities available to other citizens of his state, both he and his fellow citizens are limited in their opportunity to fully participate in our democratic way of life. Petitioner contends that a complete and proper education cannot be attained under the "separate but equal" doctrine of *Plessy* v. *Ferguson*.

WHEREFORE, it is respectfully submitted that the judgment of the Court below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM ~~1948~~ 49

No. ~~387~~ 44

HEMAN MARION SWEATT, *Petitioner*

v.

THEOPHILUS SHICKEL PAINTER, ET AL., *Respondents*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX THERETO

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 667

HEMAN MARION SWEATT, *Petitioner*

v.

THEOPHILUS SHICKEL PAINTER, ET AL., *Respondents*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Based on a long line of decisions by this Court, the courts of Texas have held that the State may provide education for its white and Negro students at different institutions where it is shown as a fact that the facilities offered both groups are substantially equal.

The admission of Petitioner, a Negro, to The University of Texas was denied because of the sections of the Texas Constitution which are to the effect that separate schools shall be provided.[1] Petitioner's

[1] Secs. 7 and 14, Art. VII, and related statutory provisions set out in Appendix at page 109.

mandamus was denied by the trial court because of the above holdings of this Court and because it found as a fact that the separate law school for Negroes offered Petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas." (R. 440.)

Petitioner stated on the trial that even if the Negro law school was the absolute equivalent of the Law School of The University of Texas, he would not attend it. (R. 188.) The trial court's judgment recites that:

> "From his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages . . ." (R. 440.)

No exception was taken by Petitioner to such finding.

As will be further discussed, Petitioner did not invoke the jurisdiction of the Texas Court of Civil Appeals as to the want or sufficiency of the evidence to support the findings of fact as to the equality of the schools. That Court nevertheless wrote that "*Our jurisdiction in this latter regard was not invoked in this case.* . . . However . . . were our jurisdiction in that regard properly invoked, we would be constrained to hold that its preponderance and overwhelming weight supports the trial court's judgment." (R. 461.) Nor was the jurisdiction of the Texas Supreme Court invoked to consider whether there was evidence to support the findings

of fact and the judgment. In the absence of such point of error, that Court has no jurisdiction to pass on the matter.[2]

So Petitioner is asking this Court to grant certiorari on the assignment of error that "the Court erred in finding that the law school for Negroes at Austin was the 'equivalent or substantial equivalent of the law school of (The) University of Texas,'"[3] where he did not invoke the jurisdiction of the Texas appellate courts on that issue. It is submitted that this case is not a proper one for review by certiorari in this Court.

The Texas Courts have not decided a federal question of substance not heretofore determined by this Court, nor have they decided this case under the facts in a way not in accordance with the applicable decisions of this Court.[4] To the contrary, they have expressly followed such decisions, as will be more fully discussed. For that additional reason, this case is not a proper one for review by certiorari by this Court.

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[2]Petitioner's points of error are set out in the appendix, page 106. This matter was called to the attention of Petitioner and the Texas Supreme Court in Respondent's reply in that Court. Respondent's second point in that Court read in part, "No assignment of error was made as to such fact finding in Petitioner's motion for rehearing in the Court of Civil Appeals. There is no assignment in this Court that there is no evidence to support such findings." Petitioner did not reply to such point. Rule 476 (Tex. Rules Civ. Pro.) provides: "Trials in the Supreme Court shall be only upon the questions . . . raised by the assignments of error in the application for writ of error . . ."

[3]Petitioner's fourth "Error Relied Upon," page 16 of his Petition in this Court.

[4]Rule 38-5(a) of this Court.

STATEMENT OF THE CASE

The Texas Legislature in 1947 provided for the mandatory establishment of The Texas State University for Negroes to be located at Houston, and for the immediate establishment of one of its branches, the School of Law, to be located at Austin until the university at Houston was ready to assume the responsibility.[3] The statute states that:

> "It is the purpose of this Act to establish an entirely separate and equivalent university of the first class for Negroes with full rights to the use of tax money and the general revenue fund for establishment, maintenance, erection of buildings, and operation . . ."

Two million dollars was appropriated for the acquisition of land and other property for The Texas State University for Negroes, and five hundred thousand dollars was appropriated for its operation and maintenance for each year of the following biennium. In addition, the buildings, 53 acres of grounds in Houston between Rice Institute and The University of Houston, and other assets of the Houston College for Negroes, having a net value of over $1,000,000, were turned over to this university.[4]

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[3]Senate Bill 140, 50th Leg., 1947, Ch. 29, p. 36, carried as Art. 2643(b) Tex. Civ. Stat., Vernon 1948, set out in the Appendix at page 110.

[4]Report of State Auditor to Governor, Aug. 31, 1948, on the Texas State University for Negroes. This transfer was made pursuant to H. B. 780, 50th Leg. 1947, being Art. 2643(c) Tex. Civ. Stat. (Vernon 1948). It is discussed in the Record. (R. 54.)

With reference to the Law School at Austin, the Act provides:

> "... the Board of Regents of The University of Texas *is authorized and required to forthwith* organize and establish a separate School of Law at Austin for Negroes, to be known as the 'School of Law of The Texas State University for Negroes' and therein provide instruction in law equivalent to the same instruction being offered in law at The University of Texas. . . . There is hereby appropriated, as an emergency appropriation, the sum of One Hundred Thousand ($100,000.00) Dollars . . . to be expended by the Board of Regents of the University of Texas in order to establish and operate the separate Law School."

Such Law School was and is established. (R. 36-43, 86.)

On March 3, 1947, the Registrar wrote Petitioner that the School of Law would be open March 10, 1947, and that his application theretofore made (to The University of Texas) and his qualifications would entitle him to enter. (R. 159; Exhibit 13, R. 372.)

The letter informed Petitioner that his instructors would be *the same professors* who were and are teaching at the School of Law of The University of Texas; that the courses, texts, collateral readings, standards of instruction, and standards of scholarship *would be identical* with those prevailing at the School of Law of The University of Texas; that a library was being installed, and that full use of the library of the Supreme Court of Texas was available

prior to the delivery of a complete new library then on order; and that the new library would include all books required to meet the standards of the American Association of Law Schools and the American Bar Association. (R. 372-374.)

Although Petitioner received the letter, he did not answer it. (R. 175.) Without coming to Austin to talk to the Dean, the Registrar (R. 175), or any of his prospective professors (R. 186), and without making any personal investigation of the school (R. 174), the courses, faculty, or physical plant, he decided not to attend. (R. 177, 186.) The school was nevertheless ready to receive and instruct him. (R. 86.)

After hearing the evidence, the trial court found in its judgment:

> ". . . this Court is of the opinion and finds from the evidence that during the appeal of this cause and before the present hearing, the Respondents herein, . . . have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas; that Relator, although duly notified that he was eligible and would be admitted to said law school March 10, 1947, declined to register; . . ." (R. 440.)

After the trial of the case,[7] three students applied for and were admitted to the School of Law, Texas State University for Negroes in September, 1947.[8] There are now 23 students in the School of Law, including two of the above who are now finishing their second year. The Law School now is established as a part of the Texas State University for Negroes located in Houston, the home of Petitioner. That law school, as of January 1949, had in its shelves 16,371 bound volumes of law books and 772 volumes in the warehouse awaiting transfer. Orders for 1,046 additional volumes have been placed.[9] The minimum standards of the American Bar Association require 7,500 volumes (R. 6). The law school has a dean who is paid $7,500 a year and five full-time professors[10] who are paid $500 a month or more,[11] and a full-time librarian. While the school is adequately housed in the main building of the

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[7]This Court may consider any change in facts supervening since the judgment was entered. *Gulf C. & S. F. Ry. v. Dennis*, 224 U. S. 503 (1912); *Watts, Watts & Co. v. Unione Austriaca*, 248 U. S. 9 (1918); *Missouri ex rel. Wabash Ry. v. Public Service Comm.*, 273 U. S. 126 (1927); *Patterson v. Alabama*, 294 U. S. 600 (1935); *Villa v. Van Schaick*, 299 U. S. 152 (1936).

[8]Report of the Dean of the School to the Governor of Texas on Jan. 27, 1948, set out in the Appendix on page 103.

[9]State Auditor's Report to Governor and Legislature, Appendix, page 99.

[10]O. H. Johnson, Dean, B.S. Kansas State; M.S. Iowa, LL.B. Temple U.; Earl L. Carl, B.A. Fisk, LL.B. Yale; Everett Bell, B.A., LL.B. University of Kansas; William A. George, B.A. Lane College, LL.B. Western Reserve; J. E. Thomas, B.A., LL.B. Western Reserve; and William B. Harris, B.A., LL.B. Temple, professors; and R. L. King, J.D. University of Chicago, Librarian.

[11]*Ibid.*, Note 8.

Texas State University for Negroes, the Texas Board of Control has recommended the erection of a $250,000 law building on that campus. The Legislature is now in session. As of this time, this item stands approved in both the Senate and House Appropriation Bills.[12] The school has been approved by the State Board of Bar Examiners.[13]

As to the Texas State University for Negroes, in addition to its present buildings, construction is in progress on buildings including a $1,637,000 Administration and Classroom Building. Its completion date is September 1949.[14] The present appropriation bills of the House and Senate include $1,800,000 for additional buildings and over two million dollars for operation and maintenance during the next biennium. The University is also empowered to retain and expend all fees and other receipts collected by it, a sizeable factor. (H. B. 546, 51st Leg. 1949.)

The Legislature has also enacted a statute empowering the University for Negroes, through the issuance of bonds, to erect student activity buildings, student and faculty dormitories, gymnasia, stadia, dining halls, and other buildings for the health and welfare of the students and faculty.[15] Of course these buildings are for the whole student body and faculty, including those in the law school.

As of February 12, 1949, that University had an enrollment of 2,032 students, 211 of which are in its

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[12] H. B. 319, S. B. 134, 51st Leg., 1949.

[13] *Ibid.*, note 9; Appendix, page 99.

[14] Regents Report to Governor, Appendix, page 88.

[15] H. B. 545, 51st Leg., 1949.

graduate school. It has a teaching faculty of 115 in addition to administrative and operative personnel.[16] Its president[17] and 17 members of the faculty hold Doctors degrees. The University has been approved and given a Class "A" rating by the Southern Association of Colleges and Secondary Schools.[18]

That University awarded 36 Bachelors degrees and 30 Masters degrees in June 1948. It awarded 68 Bachelors of Arts, 19 Bachelors of Science, and 65 Masters degrees in August 1948.[19] The Texas State University for Negroes is very much alive; it is certainly not something on the drawing boards.

FIRST POINT

Section 7 of Article VII of the Texas Constitution and other related constitutional and statutory provisions providing that the State shall separately educate its Negro and white students are constitutional. They do not violate the equal protection clause of the Fourteenth Amendment.

ARGUMENT AND AUTHORITIES

The decisions of this Court are uniform in their holding that states may, by constitution or statute,

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[16] *Ibid.*, Note 14; Appendix, page 95.

[17] Raphael O'Hara Lanier, American Minister to Liberia, 1946, until he was installed as president; Assistant Director of Negro Affairs N.Y.A., Washington, D. C. 1938-40; Special Assistant Bureau of Services U.N.R.R.A. 1945-46. (From *Who's Who in America*, 1948-49, page 1420.)

[18] Report to Governor by Board of Regents, Feb. 12, 1949, Appendix, page 95.

[19] *Ibid.*, Note 18; Appendix, page 94.

provide separate establishments for the education of their Negro and white students, provided each group receives substantially equal facilities and opportunities. Related to the education cases are transportation cases. The transportation cases are cited for their holdings on the "equal protection clause."

United States Supreme Court Decisions

Because the doctrine of stare decisis has had an important part in the development of this line of cases, the decisions are presented in chronological order.

Hall v. DeCuir, 95 U. S. 485 (1877). A Louisiana statute provided for enforced commingling of the races in common carriers. A steamboat master, operating in interstate commerce, was arrested for having denied a Negro woman the right to remain in cabins reserved for whites. In reversing the conviction, this Court held that the Louisiana statute was an interference with interstate commerce. Congressional inaction left the ship's master free to adopt such reasonable rules as seemed best for all concerned. Said the Court:

> ". . . We think it may safely be said that State legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. . . .
>
> ". . . If each State was at liberty to regulate the conduct of carriers . . . the confusion likely to follow could not but be productive of great

> inconvenience and unnecessary hardship. . . . . we think this (Louisiana) statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional. . . ." 95 U. S. at 490.

Justice Clifford concurring, went into the matter more fully, including the reasonableness of the classification:

> ". . . Substantial equality of right is the law of the State and of the United States; but equality does not mean identity, as in the nature of things identity in the accommodation afforded to passengers, whether colored or white, is impossible. . . ." 95 U. S. at 503.

Reviewing the authorities, he wrote:

> "Questions of a kindred character have arisen in several of the States, which support these views in a course of reasoning entirely satisfactory and conclusive. . . . equality of rights does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that *any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution*, nor would it contravene the provisions of either. *State v. McCann*, 21 Ohio St. 198.
>
> "Separate primary schools for colored and for white children were maintained in the city

> of Boston. . . . Distinguished counsel insisted that the separation tended to deepen and perpetuate the odious distinction of caste; but the court responded, that they were not able to say that the decision was not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment. *Roberts v. City of Boston*, 5 Cush. (Mass.) 198.
>
> "Age and sex have always been marks of classification in public schools throughout the history of our country, and the Supreme Court of Nevada well held that the trustees of the public schools in that State might send colored children to one school and white children to another. . . . ."
>
> ". . . and it is settled law there that the (school) board may assign a particular school for colored children, and exclude them from schools assigned for white children, and that such a regulation is not in violation of the Fourteenth Amendment.". 95 U. S. at 506.

Plessy v. Ferguson, 163 U. S. 537 (1896). A later Louisiana statute required that colored and white passengers be furnished separate accommodations on carriers. Plessy, a Negro, was convicted for refusing to occupy the section set aside for his race. The railroad did not operate in interstate commerce. It was squarely contended by Plessy that the state law, as applied to him, violated the equal protection clause.[20] In overruling the contention, this Court wrote:

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[20]Among the questions presented in the brief for plaintiff in error (Plessy) was: "Has the State the power under the provisions of the Constitution of the Untied States to make a distinction based on color in the enjoyment of chartered privileges within the State?" (Page 5, his Brief.)

"The object of the (14th) Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. *The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.* . . .

"The distinction between laws interfering with the *political equality* of the Negro and *those requiring the separation of the two races in schools,* . . . and railway carriages *has been frequently drawn by this court.* . . .

"*So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation,* and with respect to this there must necessarily be a large discretion on the part of the Legislature. *In determining the question of reasonableness* it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their com-

fort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures. . . .

". . . When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed."

Cummings v. Board of Education, 175 U. S. 528 (1899). An injunction to compel the withholding of all assistance to a white high school, where the board failed to provide a Negro high school, was denied as an inappropriate action. It was held that the board's action did not violate any rights of plaintiffs under the Fourteenth Amendment. Mr. Justice Harlan (who dissented in the *Plessy* case) wrote the following often-quoted language:

"Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs, and to those associated with them of the equal protection of the laws, or of any privilege belonging to them as citizens of the United States. We may add that while all admit that the

benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, *the education of the people in schools maintained by state taxation is a matter belonging to the respective States*, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. . . ."

This language is quoted with approval by this Court in *Gong Lum v. Rice*, 275 U. S. 78 at 85, hereinafter discussed.

Chesapeake & Ohio Ry. v. Kentucky, 179 U. S. 388 (1900). A Kentucky statute required railways to furnish separate cars for white and Negro passengers. Upon being convicted for violations of the act, the railway appealed. After determining that the Kentucky act applied only to its domestic and not interstate commerce, this Court concluded that under the *Dc Cuir* and other cases, there could be no doubt as to its constitutionality.

To emphasize that this Court did consider and pass upon the separation of the races under the equal protection clause, the following is quoted from Mr. Justice Brown's opinion. It refers to the *Plessy* case:

"On writ of error from this court, it was held that no question of interference with interstate commerce could possibly arise, since the East Louisiana Railway was purely a local line, with both its termini within the State of Louisiana. Indeed, the act was not claimed to be unconstitutional as an interference with interstate com-

> merce, but *its invalidity was urged upon the ground* that it abridged the privileges or immunities of citizens, deprived the petitioner of his property without due process of law, and also denied *him the equal protection of the laws. His contention was overruled, and the statute held to be no violation of the Fourteenth Amendment.*" 179 U. S. at 393.

Berea College v. Kentucky, 211 U. S. 45 (1908). A private college, a Kentucky corporation, was convicted of violation of a Kentucky statute which made it unlawful for a person or corporation to operate a school or college which received both white and Negro students. Wrote Mr. Justice Brewer:

> ". . . the single question for our consideration is whether it (the statute) conflicts with the Federal Constitution. . . . That the Legislature of Kentucky desired to separate the teaching of white and colored children may be conceded. . . ." 211 U. S. at 53, 55.

It was decided that the statute should be upheld. Corporations being creatures of the State, it could grant or withhold corporate powers.

The holding was that the State could, within the Fourteenth Amendment, prohibit the teaching of white and Negro students together in the same private school or college. It goes much further than the public schools. The breadth of the holding is emphasized in the dissent by Mr. Justice Harlan, who points out that the title of the act read:

> "An Act to prohibit white and colored persons from attending the same school."

He further pointed out that the trial court overruled the objection that the statute violated the Fourteenth Amendment, and that the highest court of Kentucky held that it was entirely competent for the State to adopt the policy of the separation of the races. He wrote:

> "It is absolutely certain that the legislature had in mind to prohibit the teaching of the two races in the same private institution, at the same time by whomever that institution was conducted." 211 U. S. at 62.
>
> "Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense." 211 U. S. at 69.

Chiles v. Chesapeake & Ohio Ry., 218 U. S. 71 (1910). Chiles, a Negro traveling in interstate commerce, was required to move to a section set apart for Negroes. The Kentucky courts held that their statute requiring separation of the races was not applicable to interstate passengers. It denied relief on the basis of the regulations of the railway company requiring separation. The sole questions before this Court were the validity and reasonableness of those regulations.

This Court first considered the commerce clause. *Hall v. DeCuir* was followed in its holding that in the absence of Congressional regulation of interstate commerce, carriers may make *reasonable* regulations for the safety and comfort of its passengers.

Regarding the reasonableness of the regulation, this Court turned to *Plessy v. Ferguson:*

> "The statute was attacked on the ground that it violated the Thirteenth and Fourteenth Amendments of the Constitution of the United States. The opinion of the court . . . reviewed prior cases, and not only sustained the law *but justified as reasonable the distinction between the races on account of which the statute was passed and enforced.* It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. *Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable.* See also *Chesapeake & Ohio Ry. Company v. Kentucky*, 179 U. S. 388.
>
> "The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. We may refer to Mr. Justice Clifford's concurring opinion in *Hall v. DeCuir* for a review of the cases. They are also cited in *Plessy v. Ferguson* at page 550. We think the judgment should be affirmed."

McCabe v. A. T. & S. F. Ry. Co., 235 U. S. 151 (1914). Action by Negro citizens to enjoin enforce-

ment of an Oklahoma statute requiring separation of white and colored citizens on trains and in waiting rooms because (1) such statute violated the Fourteenth Amendment, and (2) the statute constituted a burden on interstate commerce.

With reference to the Fourteenth Amendment, this Court expressly approved the holding of the Circuit Court:

> "That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th Amendment for a State to require separate, but equal, accommodations for the two races."

Gong Lum v. Rice, 275 U. S. 78 (1927). A Mississippi statute provided that separate schools should be maintained for white and colored students. A Chinese girl was denied admission to a white school. A direct attack was made on the separation of the children for schooling purposes, the contention being made that such was a violation of the Fourteenth Amendment. The first assignment of error in this Court was:

> "A child of school age and otherwise qualified . . . is denied the equal protection of the laws when she is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race." (Brief and Argument for Plaintiff in Error, p. 5.)

Mr. Chief Justice Taft wrote:

> "The case then reduces itself to the question whether a state can be said to afford to a child of

Chinese ancestry born in this country, and a citizen of the United States, equal protection of the laws by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.

"The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. . . .

"The question here is whether a Chinese citizen of the United States is denied equal protection of the laws *when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black.* Were this a new question, it would call for very full argument and consideration, but *we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts* under the Federal Constitution."

Mr. Chief Justice Taft then adopted the following from *Plessy v. Ferguson:*

"'The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.'"

He concluded:

"The decision is within the discretion of the state in regulating its public schools and does

not conflict with the Fourteenth Amendment. The judgment of the Supreme Court of Mississippi is affirmed."

Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938). Action by Gaines, a Negro, to compel his entrance to the University of Missouri School of Law. The first point raised in the Petition for Certiorari (p. 17) was:

> "The State of Missouri denied petitioner the equal protection of the laws in excluding him from the School of Law of the University of Missouri solely because he is a Negro."

Upon a finding that there was no established school of law for Negroes, and that there was no mandatory duty upon any official to establish such a school, this Court held that "*in the absence of other and proper provisions for his legal training within the State*," Gaines would be entitled to enter the University of Missouri Law School.[21] Mr. Chief Justice Hughes wrote:

> "In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education

[21] The cause was remanded to the Missouri Supreme Court. Its subsequent decision, 344 Mo. 1238, 131 S. W. (2d) 217 (1939), recognized that the Legislature had enacted a statute making it mandatory that equal educational opportunities be afforded colored students. It remanded the cause to the trial court for a finding on such equality by the opening of the next school year.

substantially equal to the advantages afforded to white students. *The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions.*". 305 U. S. at 334.

"Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other Negroes sought the same opportunity."

". . . *The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State.* . . . By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. 305 U. S. at 349.

"We are of the opinion . . . that petitioner was entitled to be admitted to the law school of the State University *in the absence of other and proper provision for his legal training within the State.*"

Sipuel v. Board of Regents, 332 U. S. 631 (1948). Mandamus by a Negro to compel her admission to the Oklahoma law school.[*] The relief was denied

[*] The question was there presented to this Court: "Does the Constitution of the United States prohibit the exclusion of a qualified Negro applicant solely because of race from attending the only law school maintained by the State?"

by the State court principally on the ground that Sipuel had not made proper demand for the establishment of a separate law school. The brief Per Curiam holding of this Court was:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines v. Canada.* . . ."

Fisher v. Hurst, 333 U. S. 147 (1948). Following the *Sipuel* decision, the Oklahoma Supreme Court directed the Board of Regents of Oklahoma University:

> ". . . to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups . . . in conformity with the equal protection clause . . . and with the provisions of the Constitution and statutes of this State requiring segregation. . . ." 333 U. S. at 148.

(Petition for Certiorari, page 5.) The headnote of Argument read, "This Court should re-examine the constitutionality of the doctrine of 'separate but equal facilities.'" (*Ibid.*, p. 18.) The arguments were there made as here that, "The doctrine of 'separate but equal' is without legal foundation." And: "Classifications and distinctions based on race or color have no moral or legal validity. They are contrary to our Constitution and laws . . ." (Ibid., p. 27.)

Pursuant thereto, the trial court ordered that unless the separate law school was established and ready to function at the designated time applicable to any other group, the Board of Regents must:

> "(1) enroll plaintiff . . . in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain . . . until such a separate law school for negroes is established. . . .
>
> "(2) not enroll any applicant of any group . . . until said separate school is established. . . .
>
> "It is further ordered . . . that if such a separate law school is so established . . . the defendants . . . are hereby ordered . . . to *not* enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma. . . ." 333 U. S. at 149.

Although this Court's opinion states that the question as to whether the equal protection clause could be satisfied by the establishment of a separate law school was not in issue (and we do not, of course, question the statement), Mrs. Fisher contended in her brief that: "Equality under a segregated system is a legal fiction and a judicial myth." And the American Civil Liberties Union, as amicus curiae, argued that "segregation of Negroes from whites violates the equal protection clause."[23]

The question before this Court was whether its mandate in the *Sipuel* case had been followed. This Court concluded that:

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[23]This information is taken from Comment (1949), 17 George Washington Law Review 208 at 225, footnote 97.

> "It is clear that the District Court . . . *did not depart from our mandate.*"

The Court explained the *Sipuel* case:

> "The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she failed to demand establishment of a separate school. . . . On remand, the District Court correctly understood our decision to hold that the equal protection clause permits no such defense."

The *Sipuel* case, citing the *Gaines* case with approval and as authority, therefore continued the long established holding that separate schools may be provided so long as the facilities are equivalent. It made clear that the opportunities must be provided for the Negro students as soon as they are made available to white students. In this case, the School of Law of the Texas State University for Negroes was available to Petitioner at the time of this trial and is still available to him.

This Court's holdings that the States may provide separate facilities for white and Negro students are recognized and set out in many texts, including 2 Warren (Rev. Ed. 1926), *The Supreme Court in United States History* 608 (commending the Court on its decisions); Warsoff, *Equality and the Law* (1938), page 207; Brannon, *The Fourteenth Amendment*, pages 89-92; Sutherland, *Notes on the United States Constitution*, pages 702-705; 10 *Am. Jur.* 904, Civil Rights, Sec. 11; 14 *Corpus Juris Secundum* 1171, Civil Rights, Section 11; 5 *R.C.L.* 596, Civil Rights, Sections 20 and 21.

Other Federal and State Court Cases

Many of the strongest cases upholding the constitutionality of separation of the races have come from the highest courts of states outside the South. These cases, together with the many cases decided in the Southern States are set out in the Appendix beginning on page . They form a great body of the law on which the structure of important state functions of many states have been built. They are an important body of cases. They are placed in the Appendix in the interest of brevity.

Two of the cases decided out of the South are here set out as illustrative.

In *People v. School Board of Borough of Queens*, 161 N. Y. 598, 56 N. E. 81 (1900), the only question was "whether the borough of Queens is authorized to maintain separate schools for the education of colored children within the borough." In upholding such action, the highest New York Court declared:

> "The most that the constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated,—not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the constitution to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the

children, and not that it should provide for them any particular class of associates while such education was being obtained. . . ."[24]

State ex rel. Weaver v. Board of Trustees of Ohio State U., 126 Ohio St. 290, 185 N. E. 196 (1933).[25] Ohio State University offered a Home Economics course in which female students operated a residence wherein they lived. The course included cooking, buying, cleaning, etc. A Negro's application for this course was refused, and an equivalent course was offered. She sued to compel her admission. The Ohio Supreme Court wrote in denying the mandamus:

"'Any classification which preserves substantially equal school advantages is not prohibited by either the state or federal constitution, nor would it contravene the provisions of either.' . . . the respondents had full authority to prescribe regulations that will prove most beneficial to the university and state and will best conserve, promote, and secure the educational advantages of all races. The purely social relations of our citizens cannot be enforced by law; nor were they intended to be regulated by our own laws or by

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[24]The Legislature of New York in 1909 enacted a statute which prohibits separation of the races in schools. (Thompson's Laws of N. Y., Acts 1909, Ch. 14, sec. 40, p. 250.) The enactment of such statute is fully within the power of the State, just as laws requiring separation. This statute does not change the holding of the Courts where the statutes permit or require separation.

[25]The Hon. John W. Bricker, then Attorney General of Ohio, represented the Board of Trustees in this case.

the state and Federal Constitutions. . . . 'When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempts to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically."

Petitioner's Cases Distinguished

The cases cited by Petitioner are principally those involving discrimination (as distinguished from separation) against persons of the Negro race in matters of civil and political rights, such as jury service, voting in primaries, obtaining confessions by duress, property rights, and the like. These cases are obviously distinguishable from situations where persons of the Negro race are offered equivalent opportunities for obtaining an education. As said by this Court in the *Plessy* case:

> "The distinction between laws interfering with *political equality* of the negro and those requiring separation of the races in schools . . . has been frequently drawn by this court. . . ." 163 U. S. 537 at 545.

Pearson v. Murray

In *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936), the Court granted a mandamus admitting a Negro student to the University of Maryland law school. That State had no separate law school. In the absence of equivalent facilities, Murray was held entitled to enter the University of Maryland.

The opinion, however, recognizes that where equal opportunities are offered, a State may offer education at separate institutions. The decision reads:

> "Equality of treatment does not require that privileges be provided members of the two races in the same place. The state may choose the method by which equality is maintained. 'In the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.'"

Civil and Political Rights Cases

There are several cases which hold that under the 14th Amendment state action that prevents Negroes from serving on juries, or systematically excludes them, is unconstitutional. *Strauder v. West Virginia*, 100 U. S. 303, simply holds that where a Negro is convicted of murder upon an indictment by a grand jury upon which no Negro served or could serve, the conviction must be reversed. The case is

one of discrimination, and not one of separation with equivalent facilities.[26]

To the same effect are cases involving voting rights.[27] The right to vote is a political right guaranteed by the Federal Constitution. These cases have nothing to do with offering of equal facilities in education.

There are several cases which have reversed criminal convictions of Negroes where it was shown that the convictions were based on confessions which were obtained under duress.[28] Obviously these duress cases apply to white as well as Negro citizens. The obtaining of a confession by whipping and burning, whether applied to Negro or white, has nothing to do with the offering of equivalent facilities for education.

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[26]Other cases involving jury service, with the same holding, are *Carter v. Texas*, 177 U. S. 442 (1900) (grand jury); *Pierre v. Louisiana*, 306 U. S. 354 (1939) (grand jury); *Smith v. Texas*, 311 U. S. 128 (1940) (grand jury); *Hill v. Texas*, 316 U. S. 400 (1942) (grand jury); *Patton v. Mississippi*, 332 U. S. 463 (1947) (grand jury); *Brunson v. North Carolina*, 333 U. S. 851 (1948) (grand jury). But cf. *Akins v. Texas*, 325 U. S. 398 (1945), and *Moore v. New York*, 333 U. S. 565 (1948).

[27]*Nixon v. Herndon*, 273 U. S. 536 (1927); *Nixon v. Condon*, 286 U. S. 73 (1932); *Lane v. Wilson*, 307 U. S. 268 (1939); *U. S. v. Classic*, 313 U. S. 299 (1941); *Smith v. Allwright*, 321 U. S. 649 (1944), overruling *Grovey v. Townsend*, 295 U. S. 45; *Chapman v. King* (C.C.A. 5th, 1946), 154 F. (2d) 460, cert. den. 327 U. S. 800; and *Rice v. Elmore* (C.C.A. 4th, 1947), 165 F. (2d) 387, cert. den. 333 U. S. 875 (1948).

[28]*Brown v. Mississippi*, 297 U. S. 278 (1936); *Chambers v. Florida*, 309 U. S. 227 (1940); *White v. Texas*, 309 U. S. 631, 310 U. S. 530 (1940); *Ward v. Texas*, 316 U. S. 547 (1942); and *Lee v. Mississippi*, 332 U. S. 742 (1948). But cf. *Lyons v. Oklahoma*, 322 U. S. 596 (1944).

The Chinese and Japanese Exclusion Cases

A short summary of the facts of these cases will show their distinction.

Yick Wo v. Hopkins, 118 U. S. 356 (1886). A broad city ordinance gave a board unbridled power. The board arbitrarily refused to license 200 Chinese laundrymen and licensed 80 non-Chinese similarly situated. It was held that the equal protection clause applied to aliens, and that these Chinese were not afforded equal protection. They were not given equal opportunity but were completely deprived of the right to work and earn a living.

Truax v. Raich, 239 U. S. 33 (1915). An Arizona statute required employers to employ at least 80% qualified electors or citizens. Raich, an alien cook, was about to be fired simply because he was not a citizen. As in the *Yick Wo* case, it was held that the statute did not give Raich equal protection of the laws. The Court said that the Legislature does not have the power "to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood . . . *the right to work . . . is the very essence of personal freedom and opportunity that it was the purpose of the 14th Amendment to secure.*"

Takahashi v. Fish and Game Comm., 334 U. S. 410 (1948), falls under the above ruling. There the California statute kept an alien Japanese from

fishing. It was the *right to work* which was protected.[29]

These cases hold that a person may not be deprived of earning a living and kept from working at his trade simply because of race. They are clearly distinguishable. Texas is not denying education to any race. It is offering equal educational opportunities to white and Negro students at separate institutions.

Hirabayashi v. U. S., 320 U. S. 81 (1943) and *Korematsu v. U. S.*, 323 U. S. 214 (1944), were cases holding that citizen Japanese could be made to respect curfew regulations and vacate war zones on the West Coast as a war measure. But in *Ex Parte Mitsuye Endo*, 323 U. S. 283 (1944), where a U. S. citizen of Japanese extraction, whose loyalty was not questioned, was moved out of her home and sent to a "relocation center" in another state, and had been awarded a "leave" to go by the civilian authorities in charge—and was yet arbitrarily detained, it was held that such citizen was entitled to habeas corpus to be released. The case on its facts is obviously distinguishable.

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[29]Among these "right to work" cases are *Steele v. L. & N. Ry.*, 323 U. S. 192 (1944), and *Tunstall v. Brotherhood*, 323 U. S. 210 (1944). The Court held that where Congress made a union the exclusive bargaining agency for railroad employees, that union must represent the Negro as well as white workers and not deprive the Negroes of the opportunity to obtain the better jobs simply because of race, citing the *Yick Wo* and *Gaines* cases. The union must represent both groups equally.

The Property Ownership Cases

The next group of cases held that the equal protection clause protects the rights to own and occupy land. It protects the person in that property right. Thus in *Oyama v. California*, 332 U. S. 633 (1948), it was held that land owned in the name of a U. S. citizen of Japanese extraction could not be escheated simply because it had been purchased for him by an alien Japanese in an alleged violation of the Alien Land Law of California. The citizen of Japanese ancestry was saddled with more onerous burdens in his *property* ownership than other citizens.

Similarly, in *Shelley v. Kraemer*, 334 U. S. 1 (1948), the Court held in voiding state enforcement of restrictive covenants on realty that the equal protection clause protected the Negro against state action in his *right to own and occupy property.* The Court stated:

> "We have noted that freedom from discrimination by the States *in the enjoyment of property rights* was among the basic objectives . . . of the Fourteenth Amendment." 334 U. S. at 20.

Referring to the *Oyama* case, above, the Court said:

> "Only recently this Court had occasion to declare that a state law which denied *equal enjoyment of property rights* . . . was not a legitimate exercise of the state's police power. . . ." 334 U. S. at 20.

The Court continued:

> ". . . it would appear beyond question that the power of the State to create and enforce *property interests* must be exercised within the boundaries defined by the Fourteenth Amendment." 334 U. S. at 22.

In 1866, at the time Congress was deliberating on the form in which the Fourteenth Amendment was to be submitted to the Legislatures of the States, it was expressly understood by all the members that the right "to take, hold and dispose of property either real or personal" was to be protected. Flack, *The Adoption of the Fourteenth Amendment* (1908), page 85. Further, property rights were specifically mentioned in the Civil Rights Act which Congress enacted to give effect to the Fourteenth Amendment after it was adopted. 14 Stat. 27, 8 U.S.C.A. Sec. 42; 16 Stat. 144, 8 U.S.C.A. Sec. 41. *Hurd v. Hodge*, 334 U. S. 24 (1948). On the other hand, an amendment to the Act striking out all reference to common schools was adopted. Flack, *The Adoption of the Fourteenth Amendment*, page 275.[30] Thus the first Congress to interpret the Fourteenth Amendment recognized the distinction between the right to own and enjoy property and the furnishing of an education.

These cases deal with a complete denial of the enjoyment of *property rights*. But the furnishing of

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[30] "The amendment of Mr. Kellogg, striking out all reference to common schools was agreed to, however, by a vote of 128 to 48." Flack, *Adoption of the Fourteenth Amendment*, page 275; 3 Cong. Rec. 43rd Cong., 2nd Sess. (Feb. 4, 1875), p. 1010.

an education, especially at the collegiate and professional level, is not a property right. *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934); *Waugh v. Mississippi*, 237 U. S. 589 (1915). It is referred to in the *Hamilton* case as a privilege given by the State.[31]

The distinction between the denial of the right to own and occupy property and the furnishing of equal facilities was drawn by this Court in *Buchanan v. Warley*, 245 U. S. 60 (1917). There a white citizen contracted to sell residential property in a white area to a Negro. A city ordinance prohibited the sale. The Negro attempted to avoid the sale claiming the validity of the ordinance. This Court held the ordinance void under the Fourteenth Amendment. The Negro insisted that the *Plessy* case was controlling. The Court, distinguishing between right to own property and the furnishing of equal facilities, said:

> "It will be observed that in that (*Plessy*) case, there was no attempt to deprive persons of color of transportation . . . and the express requirements were for equal though separate facilities. . . . In *Plessy v. Ferguson*, classification of accommodation was permitted upon the basis of equality for both races." 245 U. S. at 79.

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[31]The 14th Amendment provides: "No state shall make or enforce any law which shall abridge the *privileges* or immunities of *citizens of the United States* . . ." The Court held that attending a state college is not a privilege of a *citizen of the United States* but is a privilege extended by one of the States of the United States; thus again distinguishing the two types of citizenship.

Morgan v. Virginia, 328 U. S. 373 (1946) held that a state statute requiring separation in interstate carriers was invalid as a burden on interstate commerce. The shifting of passengers upon crossing state lines at night or in the daytime was an undue burden. The case is rooted in the *DeCuir* case. In the *DeCuir* case, the statute required commingling of the races. The *Morgan* case required separation of the races. Both were struck down. This Court based its decision in the *Morgan* case squarely on the interstate commerce clause. The Fourteenth Amendment and the cases construing it were not mentioned.

Regarding the interstate commerce clause, Mr. Justice Burton dissented, saying in part:

> "It is a fundamental concept of our Constitution that where conditions are diverse the solution of problems arising out of them may well come through the application of diversified treatment matching the diversified needs as determined by our local governments. Uniformity of treatment is appropriate where a substantial uniformity of conditions exists."

Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28 (1948), was also decided wholly under the interstate commerce clause. There a steamship operated to and from a sort of "Coney Island" just off shore but across the Canadian line. It refused passage to a Negro because of a company rule. It was held that the application of the Michigan Civil Rights Act to

the situation was not a burden on interstate commerce, it being a completely localized transaction. The case is further distinguishable because, as pointed out by Mr. Justice Douglas, the carrier did not offer the prosecuting witness transportation with equal facilities; it completely denied her passage.

On the other hand, where no interstate commerce is involved, state statutes requiring separation have been held not to violate the equal protection clause. *Plessy v. Ferguson*, supra; *Chesapeake & O. Ry.*, supra. Similarly where no state action is involved, similar regulation of private carriers have been upheld as reasonable. *Chiles v. Chesapeake & O. Ry.*, supra.

ARGUMENT

The foregoing cases argue themselves. They demonstrate that this Court has uniformly held that the states may furnish education to its white and Negro citizens at separate institutions so long as substantially equal facilities are offered both groups. As this Court said in the *Gong Lum* case:

> "The right and power of the State to regulate the method of providing for the education of its youth at public expense is clear. . . . The decision (to separate the races) is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment." 275 U. S. at 85 and 87.

In the *Gaines* case Mr. Justice Hughes, speaking for the Court, recognized the long-established rule. He wrote: "The state has sought to fulfill that ob-

ligation by furnishing equal facilities in separate schools, *a method the validity of which has been sustained by our decisions.*"

The *Sipuel* case cited the *Gaines* case with approval. And in refusing the mandamus in *Fisher v. Hurst* (to compel her admission to Oklahoma University), the Court by implication at least, recognized the validity of separate schools so long as they are equal. Otherwise, it would simply have ordered her admitted and would not have held that the subsequent judgments of the Oklahoma Courts in the *Fisher* case were consistent with its mandate.

It is therefore respectfully submitted that Article VII, Section 7 of the Texas Constitution and other related constitutional and statutory provisions providing that the State shall separately educate its Negro and white students are constitutional.

POINT II

The fact question of whether Petitioner was offered equal facilities is not properly before this Court because Petitioner did not present it to the Texas appellate courts for review. But assuming the issue to be properly before the Court, there is ample evidence to support the trial court's findings of fact and judgment.

ARGUMENT AND AUTHORITIES

It is elementary that whether two things are substantially equal to each other is a question of fact.

The trial court found as a fact, after hearing considerable evidence from all parties, that:

> ". . . this Court is of the opinion and finds from the evidence that . . . the Respondents herein . . . have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas. . . ." (R. 440.)

The Court further found that:

> "From his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages. . . ." (R. 440.)

No exception was taken to such finding. In view of Petitioner's statement that he would not attend the separate school even if it were absolutely equivalent, it would appear that he is not in a position to argue about the equality of the facilities. He stated himself that as to him it made no difference. (R. 188.)

The same position was taken on appeal. The findings of fact of a court sitting without a jury, under the laws of Texas, have the same force and are en-

titled to the same weight as the verdict of a jury.[32] These findings will not be disturbed by a Texas appellate court where there is evidence to support them, even though the evidence may be conflicting.[33]

The Texas Courts of Civil Appeals have the power to reverse and remand where the evidence so preponderates against the judgment that it should be set aside. Where there is no evidence to support the findings and judgment, the Courts of Civil Appeals and the Texas Supreme Court are empowered to reverse the case and render the proper judgment.[34]

Under Texas procedure it is necessary to invoke the jurisdiction of the appellate courts in this regard.[35] This Petitioner did not do so.[36] As stated by the Court of Civil Appeals:

> "Our jurisdiction in the latter regard was not invoked in this case." (R. 461.)

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[32]*Bird v. Pace*, 26 Tex. 487 (1863); *Jordan v. Brophy*, 41 Tex. 283 (1874); *Rich v. Ferguson*, 45 Tex. 396 (1876); *Baldridge v. Scott*, 48 Tex. 178 (1877).

[33]*Gray v. Luther*, 195 S. W. (2d) 434 (Tex. Civ. App. 1946, error refused); *Highsmith v. Tyler State B. & T. Co.*, 194 S. W. (2d) 142 (Tex. Civ. App. 1946, error refused).

[34]*Patrick v. Smith*, 90 Tex. 267, 38 S. W. 17 (1896); *Eastham v. Hunter*, 98 Tex. 560, 86 S. W. 323 (1905); *Sonora Realty Co. v. Fabens Townsite & Improvement Co.*, 13 S. W. (2d) 965 (Tex. Civ. App. 1929).

[35]*Wisdom v. Smith* (Tex. Sup.), 209 S. W. (2d) 164 (1948); *DeWitt v. Brooks*, 143 Tex. 122, 182 S. W. (2d) 687 (1944); Rule 476, note 2, supra.

[36]See Petitioner's points of error in the Court of Civil Appeals, Appendix, p. 105.

Similarly, an examination of Petitioner's assignments of error on Motion for Rehearing in the Court of Civil Appeals will show that again he presented no assignment of error with regard to the fact finding of substantial equality. (R. 461-464.)

The Texas Supreme Court is empowered to reverse and render a case where there is no evidence to support the findings of fact and judgment.[37]. But this point must first be made in the Motion for Rehearing in the Court of Civil Appeals.[38] There is no assignment of error in Petitioner's Application for Writ of Error to the Texas Supreme Court on the want of evidence to support the fact findings.[39]. So in this case, the question of evidence to support the finding of fact as to the equality of the schools was not before the Texas Supreme Court.[40] It had no jurisdiction to consider this point.

It follows that the refusal of the application for writ of error by the Supreme Court of Texas was based solely on the law point as to the power of the

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[37]*Schelb v. Sparenberg*, 133 Tex. 17, 124 S. W. (2d) 322 (1939); *Sovereign Camp W.O.W. v. Patton*, 117 Tex. 1, 295 S. W. 913 (1927).

[38]*Moore v. Dilworth*, 142 Tex. 538, 179 S. W. (2d) 538 (1944); *Railroad Comm. of Texas v. Mackhank Pet. Co.*, 144 Tex. 393, 190 S. W. (2d) 802 (1945); Rule 476, Note 2 supra, page 3 hereof.

[39]Petitioner's Assignments of Error in the Texas Supreme Court are set out in the Appendix, page 106.

[40]This fact was pointed out by Respondents in their reply in the Texas Supreme Court. Their second point read in part, "No assignment of error was made as to such findings in Petitioner's Motion for Rehearing in the Court of Civil Appeals. There is no assignment in this Court that there is no evidence to support such findings." Petitioner did not reply to such point.

State to provide separate facilities. Its jurisdiction on the question of whether there was evidence to support the fact finding of equality of facilities was not invoked. Its refusal of the application for writ of error, therefore, could not be construed as a holding on whether there was evidence to support that determinative finding of fact; the Court had no jurisdiction as to that point.

This Court has stated many times that it will not review matters not presented to the State Courts. The statement by Mr. Chief Justice Stone in *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430 (1940), is particularly applicable here:

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality

of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

". . . In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned."

Those "reasons of peculiar force" are particularly applicable here since Petitioner attacks the constitutional validity of the Texas Constitution as well as its statutes. This Court has been unwaivering in the application of the doctrine that it will not consider points not presented to the highest state court."

Since the fact question of substantial equality was decided by the trial court contrary to Petitioner's contentions, and he failed to present his point to the State appellate courts, he is not now in a position to ask this Court to review that matter. For that reason it is submitted that this is not a proper case for review by certiorari in this Court.

"*Wilson v. Cook*, 327 U. S. 474 (1946); *Hunter Co., Inc. v. McHugh*, 320 U. S. 222 (1943); *Clark v. Williard*, 294 U. S. 211 (1935); *New York v. Klienert*, 268 U. S. 646 (1925); *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220 (1915); *Willoughby v. Chicago*, 235 U. S. 45 (1914); *Robinson & Co. v. Belt*, 187 U. S. 41 (1902); *Bolln v. Nebraska*, 176 U. S. 83 (1900).

But even assuming the issue of fact to be properly before this Court, an examination of the record will show that there is ample evidence to support the trial court's finding of fact.

As set out in the opinions of this Court, and as discussed by the Texas Court of Civil Appeals (R. 449), it is not required that the accommodations offered to persons of different races be identical. The test is whether they are substantially equal.[*]

Evidence Supporting Fact Finding of Equality[**]

Entrance, Examination, Graduation, and Similar Requirements

The requirements for admission and fees, and regulations relating to the classification of students, classwork, examinations, grades and credits, stand-

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[*] *McCabe v. A. T. & S. F. Ry.*, 235 U. S. 151: ". . . if facilities are provided, *substantial equality* of treatment of persons traveling under like conditions cannot be refused." *Hall v. DeCuir*, 95 U. S. 485: "*Substantial equality* of right is the law of the State and the United States; but equality does not mean identity. . . ." *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337: ". . . the state is bound to furnish him within its borders facilities for legal education *substantially equal* to those which the state afforded for persons of the white race. . . ." 16 C.J.S. 1100; 10 Am. Jur. 905.

[**] The evidence here is that produced on the trial in May, 1947. On August 31, 1948, the School of Law was moved to Houston as a permanent part of The Texas State University for Negroes. Evidence regarding the facilities there offered are not in the record. The Reports of the Regents and the State Auditor (Appendix, pages 88, 89) briefly describe the subsequent growth of the School of Law.

ards of work required, and degrees awarded **were exactly *the same*** as those published in the latest catalogue of The University of Texas and used at such institution. (Ex. 7, R. 85, 371-372; 82, 114, 160.)

The Faculty

The instructors at the School of Law of the Texas State University for Negroes at the time of trial were the *same professors* who had taught or were teaching the same courses at The University of Texas Law School. (R. 82-84, 113-114, 369-371, 83.) They were the same instructors Petitioner would have had if he had been enrolled in The University of Texas. (R. 113-114.) The instructions from the Board of Regents were to use all of the faculty of the University Law School, so far as necessary, in order to maintain a full curriculum at the Negro Law School until other full-time professors could be employed for the Negro Law School. (R. 121.) The budget provided for four professors at $6,000 per year, the same pay base for professors at The University of Texas. (R. 70.) Each of the instructors devoted all of his time to teaching; each a full-time professor. (R. 59-60.) With the small enrollment at the Negro Law School, the instructors would have been more available to the students for consultation than they would have been to students at The University of Texas with its large classes of 150 to 175 students. (R. 121-122.) The Dean and Registrar of the two law schools were respectively the same persons. (R. 372, 85.)

Curriculum

The curriculum at the Negro Law School and at The University of Texas *was exactly the same.* (R. 81, 82.) The courses offered beginning students at the Negro Law School *were identical with those offered beginning students at the University:* Contracts, Torts, and Legal Bibliography. (R. 84.) These courses, with the same professors, are set out in Respondent's Exhibit 7. (R. 85, 371-372.)

Classroom

The classroom requirements were identical. (R. 82.) With much smaller classes, the Negro Law School would have provided the student with more opportunity to participate personally in classroom recitations and discussions. (R. 306.) In an average law class at The University of Texas Law School, a student would be called upon to recite only an average of 1½ times a semester. (R. 305.) In a smaller class the students would receive better experience and education; they would be called on more frequently, and would be more "on their toes." (R. 306.) The students would come to class better prepared because their chances of being called upon would be much greater; there would be a greater pressure to keep up their daily work. (R. 315.) Dean McCormick testified that "in the Negro Law School he (Sweatt) would have gotten a good deal more personal attention from the faculty than he would have had he been in the large entering class in The University of Texas." (R. 117.)

Library

At the time of trial, there were on hand in the Negro Law School books customarily used by the first-year class of the University, and other books which Miss Helen Hargrave, Librarian of the University Law School, thought would be useful. (R. 131.) There were about 200 of these books. (R. 21.) There were also available for transfer to the Negro Law School between 500 and 600 books from the University (R. 147), plus gifts of between 900 and 950 books. (R. 147.) In addition, the entire library of the Supreme Court of Texas was specifically made available to the Negro Law School by the Legislature. (R. 45.) The Supreme Court Library is located in the State Capitol Building on the second floor. (R. 6.) The Capitol grounds are some 20 feet from the Negro Law School, and the entrance is only about 300 feet from that School. (R. 37, 80.)

The Supreme Court Library contains approximately 42,000 volumes (R. 133), which number is far in excess of the 7,500-book minimum requirement of the American Bar Association. (R. 6.) Excluding duplicates, The University of Texas Law Library contains 30,000 to 35,000 books. Counting duplicates, it contains around 65,000. (R. 133.) These books serve 850 law students of The University of Texas. (R. 147.)

In some respects the Supreme Court Library is stronger than that of the University. Being a Governmental Depository, the Supreme Court Library automatically receives many reports, such as those

of administrative bodies. It is the strongest library in the South on State Session Laws. It contains Attorney General's Opinions, Tax Board Opinions, Workmen's Compensation Reports, and other items not carried by the University. (R. 132, 133.) The Supreme Court Library is more spacious for a student body of ten students than are the facilities at The University of Texas Law School Library, which are exceedingly crowded. (R. 79.) There is no more confusion, and in most instances, less confusion in the Supreme Court Library than at the Law Library of the University because of the large number of persons using the latter. (R. 146.)

On the other hand, the Supreme Court Library does not have as many textbooks, legal periodicals, or English reports as the University Law Library. (R. 131-132.) The Court's Library contains the Harvard, Columbia, Yale, and Texas Law Reviews, and the American Bar Association Journal. (R. 132.) It has the English Reports up to 1932.* The Law Library of The University of Texas and that of the Supreme Court are substantially equal except for the texts, legal periodicals, and English Reports. (R. 132-134.)

However, all of such texts, periodicals, and English Reports were readily available to the Negro Law School on a loan basis from the Law Library of The University of Texas. (R. 63-64.)

In addition, a complete law library was being procured. Of such number 1,281 books were immediately available (R. 158), and 8,727 had already been

*The evidence showed that first-year law students rarely used the English Reports (R. 147-149).

requisitioned. (R. 155.) Orders had been placed for 5,702 of the books (R. 156), all deliverable within ten to sixty days. (R. 156.) Wherever new books were available, they were ordered; second-hand books were only ordered where new ones were not available. (R. 156.) The library requisitioned included 20 Law Reviews, Indices of Legal Periodicals, Citators, Digests, Restatements, textbooks, statutes, the complete West Publishing Company Reporter System, etc. (Respondent's Original Exhibit 8, R. 130.) The undisputed evidence is that the books ordered are sufficient to meet the requirements of the American Association of Law Schools. (R. 115.)[45]

The Physical Facilities

Whereas The University of Texas Law School has three classrooms for 850 students,[46] the Negro Law School had two classrooms, a reading room, toilet facilities, and an entrance hall (R. 77; Respondent's Original Exhibit 4; R. 67), for a much smaller student body. The two law schools possessed approximately the same facilities for light and ventilation (R. 77, 88), though most law schools, including The University of Texas, need artificial light in the daytime. (R. 89.) The Negro Law School, assuming

[45]There are now 16,371 books on hand. State Auditor's Report, Appendix, page 101.

[46]The Law School building at The University of Texas was built in 1902 for 400 students (R. 21); it now has 850 students (R. 79). The Texas Bar Association has been trying for years to get the building torn down and an adequate one built (R. 21).

at that time a class of ten students, had a greater floor space per student."

The location of the Negro Law School at the time of the suit was particularly good. It was directly north of the State Capitol, separated only by a 20-foot street. (R. 37.) It was within 100 yards of the Supreme Court of Texas, the Court of Civil Appeals, the Attorney General's Office, and the Legislature. (R. 65.) It was between the business district of Austin and The University of Texas, eight blocks south of the University, and eight blocks nearer the business district. (R. 37.)

The building housing the Negro Law School was a three-story building of brick construction. (R. 164-170.) The first floor (not a basement) was occupied by the School at the time of trial (R. 41), but the upper two stories of the building were available as needed. (R. 47.) Before March 10, 1947, the premises were cleaned and painted. (R. 39.) The building had ample space to house the 10,000 volume library and leave sufficient space for classrooms and reading rooms. (R. 166.)"

"The Negro school, first floor, had 1060 square feet, or 106 square feet per student. The University Law School has 46,518 square feet for 886 students, or 53 square feet per student. And this did not take into account the upper two stories of the Negro School which were available when needed (R. 47). The floor plan shows a classroom 12′ x 12′8″; a classroom 16′6″ x 11′6″, a reading room and office 19′10″ x 15′7″, and entrance hall and toilet facilities. Respondent's Original Exhibit 4.

"There are certain minor features of a law school greatly emphasized by Petitioner. As they would have been applicable to Sweatt himself, the evidence showed:

1. *The Law Review.* The Texas Law Review is not an official function of the State of Texas or the University.

With reference to the membership requirements of the Association of American Law Schools,[19] it was shown that the Negro Law School, at the time of this trial, met the great majority of the nine requirements:

(1) It was a school not operated as a commercial enterprise, and the compensation of none of the officers or members of its teaching staff was dependent on the number of students or the fees received. (R. 14.)

(2) It satisfied the entrance requirements; i. e., pre-legal training, etc. (R. 114.)

It is a separate legal entity, a private corporation (R. 306). It was founded by the lawyers of Texas and financed by their contributions (R. 106, 112). Considerably more than half of the articles (as distinguished from case notes) are written by persons who are not University students (R. 306, 307). There is no rule which would prevent the consideration or publication of an article written by a Negro (R. 307). Not all accredited schools have law reviews; for example, the Baylor Law School (R. 307). (At the time of trial). Neither Sweatt nor any other first-year law student would be eligible to write for the law review (R. 105, 315-316).

2. *Scholarships:* All the scholarships offered at The University of Texas Law School are contributed from private sources; they do not come from the State (R. 103, 112).

3. *The Order of the Coif* is a private and not a public organization (R. 104, 112). First-year students are not entitled to admission. Students are eligible only on graduation (R. 112).

4. *The Legal Aid Clinic:* First-year students are not eligible to assist therein. Practically all the work is done by third-year students (R. 105, 112).

5. *Moot Court:* No first-year students are entitled or required to participate (R. 112, 102). Any one of the classrooms at the Negro Law School could be used for that purpose (R. 102).

[19] These requirements are set out in Relator's Exhibit 1 (R. 375-384; R. 5).

(3) The school was a "full-time law school." The school work was arranged so that substantially the full working time of the student was required at the school. (R. 114-115.)

(4) The conferring of its degrees was conditioned upon the attainment of a grade of scholarship attained by examinations. (R. 115.)

(5) No special students were admitted. In this, the School's requirement was stronger that that of the Association which permits such students under certain considerations. (R. 115.)

(6) The 10,000 volume library ordered for the School was sufficient to meet the library requirements. (R. 115.) The selection of the books was such as to conform with the Association's requirements. In addition, the Supreme Court Library of 40,000 volumes was available, plus loan privileges from the Law Library of The University of Texas. (R. 115; 63, 64.)

(7) The seventh requirement is that the "faculty shall consist of at least four full-time instructors who devote substantially all of their time to the work of the school." The professors in this case were full-time professors in the sense that all of their time was devoted to teaching. However, all of their teaching was not done at the Negro school; they were also teaching at Texas University. (R. 116, 117.)

(8) Provision was made for keeping a complete and readily accessible individual record of each student. (R. 115.)

(9) The requirement reads: "It shall be a school which possesses reasonably adequate facilities and which is conducted in accordance with those stand-

ards and practices generally recognized by member schools as essential to the maintenance of a sound educational policy." Dean Charles T. McCormick, President of the American Association of Law Schools in 1942 (R. 76), testified that in his opinion the Negro Law School met this requirement. (R. 116.)

The testimony was that a two-year period is generally required before any law school may be admitted to membership in the Association of American Law Schools. Dean McCormick testified that he knew of no reason why the Negro Law School could not comply with all of those standards within that two-year period—before any entering student (including Petitioner) could graduate from the school. (R. 118.)

Regarding the Law School at the time of trial, Mr. D. A. Simmons, President of the American Judicature Society 1940-1942, and President of the American Bar Association 1944-1945, testified:

> "In my opinion, the facilities, the course of study, with the same professors, would afford an opportunity for a legal education equal or substantially equal to that given the students at The University of Texas Law School." (R. 8.)

Dean Charles T. McCormick, President of the Association of American Law Schools, 1942 (R. 76), testified that facilities at the Law School for Negro citizens furnished to Negro citizens an equal opportunity for study in law and procedure (R. 85); that considering the respective use by the respective number of students, the physical facilities offered

by the Negro Law School were substantially equal to those offered at The University of Texas Law School. (R. 78, 79.) He stated that:

> "I would say . . . the Negro student has at least equal and probably superior facilities for the study of law." (R. 108.)

Mr. D. K. Woodward, Jr., Chairman of the Board of Regents of The University of Texas, testified:

> "What we set up there was a plant fully adequate to give the very best of legal instruction for the only man of the Negro race who had ever applied for instruction in law at the University in about 63 years of the life of the School." (R. 48.)
>
> "I am talking as a man familiar with what it takes to provide a thorough training in law in the State of Texas, and I stated the facts within my own personal knowledge, that the facilities which the Board of Regents of the University set up in accordance with Senate Bill 140 are such as to provide the Relator in this case the opportunity for the study of law unsurpassed any time elsewhere in the State of Texas, and fully equal to the opportunity and instruction we are offering at the University any day." (R. 42, 43.)

As an addendum to the above facts, the Negro Law School at its present location in Houston had on its shelves, as of January 31, 1949, 16,371 bound volumes and many pamphlets, journals, et cetera, for its 23 students. In addition to 772 volumes awaiting transfer from warehouses, 1,046 additional volumes

have been ordered.[50] These facts attest not only to the size of the library, but also to the good faith of those who testified for Relators that 10,008 volumes had been ordered at that time.

As listed in footnote 10 on page 7, the Negro Law School has a very creditable faculty. It is located with and is a part of The Texas State University for Negroes in Houston. As discussed on page 9 hereof, that University is already one of which Texas and the Nation can be justly proud. With its 2,032 students, 115 professors, 17 of whom hold Doctors degrees, and its fine physical facilities, it has been accredited as "Class A" by Southern Association of Colleges and Secondary Schools.[51]

POINT III

Prior to the trial, the power of the States to classify, and the reasonableness of the classification as applied in this case, had been settled as a matter of law by this Court. Based thereon, evidence on the point was properly limited by the trial court.

Argument and Authorities

Because this Court, in the long line of decisions mentioned under Point I, had determined that the type of classification herein was reasonable and within the constitutional authority of the states, the trial court limited the evidence almost wholly to the question of the equality of the two schools. Much of

[50] State Auditor's Report, page 101 of Appendix.
[51] Report to Governor by the Regents, Appendix, page 95.

the evidence here cited by Petitioner was actually stricken by the Court; other portions were not offered in evidence.[52] Most of the material in Petitioner's Appendix was not presented to the trial court and is not properly before this Court.[53] We object to this large departure from the record.

Because Petitioner has devoted so much of his brief in an attempt to show that the matter has not been decided, and that this Court has not heretofore seriously considered the question of the reasonableness of the classification, it is deemed appropriate to make some further reply to his contentions.

The following excerpts from this Court's decisions will demonstrate that it has seriously considered the question and has ruled thereon, not once but many times.

Plessy v. Ferguson, 163 U. S. 537 at 550:

> "So far, then, as a conflict with the Fourteenth Amendment is concerned, *the case reduces itself to a question whether the statute of Louisiana is a reasonable regulation*, and with respect to this there must necessarily be a large

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[52]Testimony of Dr. Thompson and Donald Murray (cited pp. 11 and 12 of Petition) was stricken in the judgment (R. 441. All testimony concerning facilities furnished by other States or colleges was also stricken in the judgment (R. 440-441). Much of Relator's witness Pittenger's testimony, qualifiedly offered, was also ruled inadmissible. (R. 328, 329, 340.) The source material cited in footnotes pp. 18, 19, 22 of Petition was not offered.

[53]Of the approximately 18 texts, reports, surveys, et cetera, cited, only two (*16th Census* and *Statistics of Higher Education*, 1943-44) were introduced in the record.

discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia. . . ."

In *Chiles v. Cheaspeake & Ohio Ry.*, 217 U. S. 71 at 77, this Court said that the *Plessy* case not only sustained the law,

". . . but justified as reasonable the distinction between the races on account of which the statute was passed and enforced."

This Court then concluded anew that:

"Regulations which are induced by the general sentiments of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable.

"The extent of the differences based upon the distinction between the white and colored races which may be observed in legislation or in the regulation of carriers has been so much discussed that we are relieved from further enlarging upon it."

Similarly in *Gong Lum v. Rice*, the matter was

squarely before this Court. Mr. Chief Justice Taft stated:

> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that afforded to all. . . ."

This Court held:

> "Were this a new question it would call for full argument and consideration, but we think it is the same question which has been many times decided to be within the constitutional power of the state legislature. . . ." 275 U. S. 85.
>
> ". . . The decision is within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment."

The reasonableness of the rule was recognized by Chief Justice Hughes when he wrote in the *Gaines* case in 1938:

> "The State has sought to fulfill the obligation by furnishing equal facilities in separate schools, a method *the validity of which has been sustained by our decisions.*" 305 U. S. at 344.

The *Gaines* case is cited with approval in the *Supiel case.* 332 U. S. 631, 633.

It is submitted that this Court, in the above and other holdings, has determined and redetermined that the classification involved is a reasonable one

The question has been long settled and is not in doubt.

The Texas trial court and appellate courts so found the law to be. The trial was conducted in accordance with these holdings. Upon evidence being adduced that a separate law school had been established, the Court considered that the only question before it was the fact question: Were the facilities offered Petitioner at the time of trial substantially equal? It therefore excluded evidence of what facilities had been and were being offered to white and Negro citizens at other places and at other times.

Since the trial court excluded the evidence as irrelevant and immaterial (and it is submitted that it was correct in doing so), and because the matter was considered as settled by this Court, the State did not put on a full case to rebut the proferred testimony.

While the State does not here attempt to refute all the extraneous arguments and statistics set forth by Petitioner, there are hereinafter set out some readily apparent grounds for the present reasonableness of the classification. These excerpts are at least suffiicient to show substantial evidence in support of the present reasonableness of the classification. In setting out these matters, Respondents do not withdraw from their position that the law is settled that the State may furnish education to its white and Negro citizens in separate establishments so long as substantially equal facilities are afforded to both groups. That being the law, all of the extraneous matter in this Court on what happened in other

states and at different times is irrelevant and immaterial. It was properly excluded by the trial court and should not be considered here.

1. *Recommendations of the President's Commission on Higher Education*

It is significant that the President did not recommend those sections of the Civil Rights Committee's report regarding the elimination of separate schools in the South.[54] In the report of that Committee with regard to education, it states that, "There is a substantial division within the Committee on this recommendation."[55]

The matter has recently been before the United States Senate, and it refused to withhold educational aid to states providing education at separate establishments.[56]

There was a substantial minority report[57] by the President's Commission on Higher Education. It states, among other things:

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[54]94 Cong. Rec. 960 (Feb. 2, 1948).

[55]"To Secure These Rights," The Report of the President's Committee on Civil Rights, U. S. Gov. Printing Office, 1947, p. 168.

[56]Senator Henry Cabot Lodge's amendments to deny federal funds for education to states where the races are educated separately was defeated 65 to 16 on May 3, 1949. 95 Cong. Rec. 5593 (May 3, 1949). The Congress itself provides for separate facilities in the schools of Washington, D. C. Title 31, Dist. of Col. Code, Sections 1110-1113.

[57]By Arthur H. Compton, Chancellor Washington University, St. Louis; Douglas S. Freeman, Editor, Richmond Times-Dispatch; Lewis Jones, President, University of Arkansas; and Goodrich C. White, President Emory University. Volume II, "Higher Education for American Democracy," U. S. Gov. Printing Office, 1947, p. 29.

"The undersigned wish to record their dissent from the Commission's pronouncements on segregation *especially as related to education in the South.* . . . We believe that efforts toward these ends must, in the South, be made within the established patterns of social relationships, which require separate educational institutions for whites and Negroes. We believe that pronouncements such as those of the Commission on the question of segregation jeopardize these efforts, impede progress, and threaten tragedy to the people of the South, both white and Negro. . . . But a doctrinaire position which ignores the facts of history and the realities of the present is not one that will contribute constructively to the solution of difficult problems of human relationships."

2. *The Texas Bi-Racial Committee's Recommendations*

In 1944, a study was made at the direction of the Bi-Racial Conference on Education for Negroes in Texas.[1] The personnel on the Committee representing both races, as listed in the report, was of very high calibre. It considered five alternatives for improving Negro education at the graduate and professional level: (1) Admit Negroes to the white universities; (2) Provide subsidies for out-of-state study; (3) Regional education; (4) *Establish a new state university for Negroes;* (5) Add graduate and professional schools to existing colleges. The Committee's recommendation for the establishment of

[1] Respondent's Original Exhibit 16; R. 322, 323.

a new State university has been followed. (Ex. 16, R. 83.)

With regard to the first alternative, the admission of Negroes to existing State universities for white students, the report stated at page 83:

> "Admission of Negroes to existing state universities for whites is not acceptable as a solution of the problem of providing opportunity for graduate and professional study for Negroes, on two counts: (1) public opinion would not permit such institutions to be open to Negroes at the present time; and (2) even if Negroes were admitted they would not be happy in the conditions in which they would find themselves."

3. *The Texas Poll*

About the time the Legislature convened in 1947 to consider, among other things, the establishment of the Texas State University for Negroes, and before the trial of this case in May 1947, the Texas Poll, an independent statewide survey of public opinion which was and is carried in most of the Texas leading newspapers, published the results of a poll of Texas opinion on this very subject. It is set out in the Appendix on page 86. It states:

> "Most Negroes agree with the overwhelming sentiment of the white population in Texas that the Legislature should provide colored students with a first-class university of their own instead of allowing them to enter the University of Texas.

"Negroes vote 8 to 5 in favor of a separate university, as compared with a ratio of more than 25 to 1 among eligible white voters.

"The Texas Poll put the question to a representative cross section of adults in this form:

> " 'Under a Supreme Court ruling, Texas is faced with the problem of either setting up a first-class university for Negroes or allowing them to enter the University of Texas. What do you think ought to be done?'

"Here are the results, broken down to show the opinions of the 86 per cent of the people who are white and the 14 per cent who are Negroes:

	White	*Negro*
Set up separate university	79%	8%
Allow them in U.T.	3	5
Ignore court ruling	1	
Don't Know	3	1
	86%	14%

"Allegiance to Southern traditions and fear of racial troubles are the main reasons why whites favor a separate university for Negroes. Negroes who prefer a university of their own say: (1) Negroes aren't interested in going to school with whites; (2) Negroes should be by themselves, anyway; (3) Negroes want good training and where they get it doesn't matter.

"In this survey, as in all scientific samplings by The Texas Poll, every person gave his opinion in strict confidence. To encourage Negro respondents to voice their opinions freely, the Poll uses trained colored interviewers to contact a cross section of their race."

4. *The Gallup Poll*

The Gallup Poll of July 25, 1948, with reference to the President's Civil Rights program indicated that 84 per cent of the people of the South thought that separate facilities should be furnished in interstate transportation. Forty-two per cent of the nation as a whole favored separation of the races and nine per cent had no opinion. That is a sizeable segment of the people.

5. *The U. S. Department of Education's National Survey of Higher Education of Negroes*

This series of United States government publications[59] was prepared by Dr. Ambrose Caliver. (R. 268), a Negro who was Senior Specialist on Negro Education in the U. S. Office of Education from 1930 to 1945, a specialist in higher education of Negroes since 1945, and a member of the N.A.A.C.P.[60] A few brief excerpts will be here set out:

> "Equality of educational opportunity for white persons and for Negroes at the level of higher education can be achieved, in theory, by either of two methods: (1) By admitting both white persons and Negroes to the same institutions, or (2) by establishing parallel and equal facilities for members of the two races. In several of the States which maintain a dual educational system, however, neither of these methods

[59] Respondents' Original Exhibit 15, particularly pp. 77-91, Misc. No. 6, Vol. II.

[60] Who's Who in America 1948-49, page 375.

is actually feasible. In some of the States the *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions. . . ." Vol. II Misc. No. 6, p. 17.

"The erroneous assumption that northern universities are carrying an unduly large responsibility for the higher education of Negroes may be accounted for, in part at least, by two common misconceptions. In the first place, the size of the northern Negro population is generally underestimated and, in the second place, it is not always known that large numbers of northern Negroes go South to attend Negro colleges." Id., p. 82.

"Whereas very few southern Negroes were attending these eight northern universities in 1939-40, in the year preceding nearly 4,000 northern Negroes attended (separate) Negro colleges. Almost 3,000 of this number attended colleges in Southern States. The majority of these Negro students were residents of eight Northern States which rank high in economic resources. Thus instead of the Northern States carrying an undue burden in the higher education of Negroes, it appears that the Southern States, which have the least wealth, are providing educational facilities for Negro residents from economically more favored regions." Id., p. 90.

"It is not possible, of course, to know how much of this southward migration is due to conditions within the northern institutions which make the Negro student feel that he does not secure a well-rounded college life in a mixed university, and how much is due to the positive

advantages he feels are offered him in the Negro college. Id., p. 89.

"Some of the graduate students replying to the questionnaires were northern residents who had gone South to take their undergraduate work in Negro colleges. . . . . *Some students said frankly that the Negro college offered a more normal social life.*" Id., p. 89.

". . . . the lack of opportunity for full participation in campus activities in the North adds attraction to the opportunities for leadership in such activities on a southern Negro college campus." Id., p. 90.

"A common reason given for the choice of the Negro college was the desire for a more normal social life. The Negroes in northern institutions seldom live on the campus and seldom participate in the social activities of the University. Outside of college the Negro's social life is largely limited to association with his own people. Although southern Negro colleges operate in an area in which the total life of Negroes is restricted, the college campus itself is a small world in which the Negro student is relatively secure and in which he can achieve status among his own people." Id., p. 90.

To the same effect is an article in the *Atlantic Monthly* (April 1942), "The Negro and His Schooling," by Virginius Dabney:[1]

"Would a handful of Negro students registered at a Southern university for whites be apt

[1] Editor, Richmond Times-Dispatch; Author, "Liberalism in the South," B.A. and M.A., University of Virginia; Litt.D., University of Richmond; LL.D., William and Mary. (Who's Who in America 1948-49, page 575.)

to find themselves in congenial surroundings? It seems highly doubtful. They probably would suffer no violence, but they would almost certainly be happier at an all-Negro institution providing work of equal excellence. Evidence of this is seen in the fact that 42 per cent of the student body at Fisk University, Nashville, comes from the North, and evidently prefers the homogeneity of the Fisk all-Negro student body to the mixed student bodies available to them in their home states. Moreover, about one fourth of these Northern Negroes remain in the South after graduation. . . ."

The matter was recently considered in *Simmons v. Atlantic Greyhound Corp.*, 75 F. Supp. 166 (W.D. Va. 1947) where the Federal Court had before it the regulation of an interstate bus company which provided for the separation of white and Negro passengers. The question was the reasonableness of the rule. After referring to this Court's opinions in the *Plessy* and *Chiles* cases, the Court wrote:

". . . But I am unable to say that as of today the prevailing practice in the Southern states of the separation of white and colored passengers on common carriers is arbitrary and without reasonable basis. . . . Among the witnesses in this case were the President of the defendant company and the Presidents of two other bus companies operating in Virginia, North Carolina and other Southern states. There was testimony also from public officials of the states of Virginia and North Carolina whose duties related to the supervision of motor carriers operating in those states. All of these witnesses agreed in the opinion that the separation of white and colored

persons traveling by bus within the territory named was desirable and in the interest of both races. There is no ground for charging these witnesses personally with the harboring of racial prejudices and they testified with evident sincerity in expressing the view, born of their observation and experience, that the seating of white and colored passengers indiscriminately would increase the occasions for arguments, altercations and disturbances among passengers leading to annoyance, discomfort and possible danger to passengers of both races. The opinion of these men whose activities are concerned with the operation of these carriers cannot be ignored in determining whether the rules adopted for the seating of passengers are reasonable ones. No matter how much we may deplore it, the fact remains that racial prejudices and antagonisms do exist and that they are the source of many unhappy episodes of violence between members of the white and colored races. If it is the purpose of the defendant here to lessen the occasions for such conflicts by adoption of a rule for the separate seating of whites and colored passengers, this court cannot say that such a rule is purely arbitrary and without reasonable basis.

". . . The fact that such separation has long been enforced in a number of states by custom and by the rules of common carriers operating in such states is a matter of public knowledge of which the members of Congress are fully aware. In fact, although efforts have been made over some years to induce Congress to enact legislation on this subject, it has consistently refused to attempt such regulation. There can be no other inference than that Congress has thought it wise and proper that the matter should be left for determination to such reasonable rules as the carriers might themselves adopt

and that it considered that rules providing for the segregation of passengers in those sections where they were applied were reasonable ones. By its refusal to nullify the practices and regulations of these carriers in respect to the separation of passengers, Congress has by the strongest implication given its approval to them. This is a field of Congressional duty and responsibility. This court cannot invade it and, by usurping the powers of Congress, lay down rules by which this defendant must guide the operation of its business—rules which Congress, in the exercise of power specifically and solely entrusted to it, has refused to lay down."

Day v. Atlantic Greyhound, 171 F. (2d) 59 (C. C.A. 4th 1948), is a similar case on the facts. The equal protection clause was again invoked against the reasonableness of the carrier's regulation. This opinion concludes:

"The adoption of a reasonable regulation by an interstate carrier for the segregation of passengers does not violate the law as laid down by the Supreme Court; and *in this case both the reasonableness of the regulation and the manner in which it was enforced were fairly submitted to the jury* and determined against the plaintiff."

To summarize, the Texas Poll taken before the trial of this case found that "most of the Negroes agreed with the overwhelming sentiment of the white population in Texas that the Legislature should provide Negro students with a first-class university of their own instead of allowing them to

enter The University of Texas." The Gallup Poll of July 25, 1948, showed that 84% of the people in the South thought separate accommodations should be furnished on interstate carriers, with 42% of the Nation as a whole feeling the same way with 9% undecided. The President has not recommended to the Congress the elimination of segregation in public schools as recommended by his Committee on Civil Rights. In that Committee itself there was a substantial division. There was also a substantial minority report from the President's Commission on Higher Education which dissented from the Committee's findings "especially as related to education in the South." The Texas Bi-Racial Commission found that admission of Negroes to State universities for whites "is not acceptable as a solution of the problem." Many reasons for separate schools appear in the U. S. Government's Office of Education publications on "The National Survey of the Higher Education of Negroes." That government survey, prepared under the direction of an outstanding Negro educator, concludes that, "In some states the *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institution."

The above summary, of course, does not wholly develop the situation. But it is submitted as being sufficient to show that the classification is not without substance and reason.

Conclusion

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in

this Court, and that the Petition for a Writ of Certiorari should be denied.

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Dated May 16, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 667

HEMAN MARION SWEATT, *Petitioner*

v.

THEOPHILUS SHICKEL PAINTER, ET AL., *Respondents*

APPENDIX

To Brief of Respondents in Opposition to Petition for Writ of Certiorari

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Other Federal and State Court Decisions That the State May Furnish Education to White and Negro Students at Separate Institutions

Wrighten v. University of South Carolina, 72 F. Supp. 948 (E.D. S.C. 1947). The Circuit Court (unreported) returned the case to the District Court for a fact finding of equality of the separate law school established after the first trial. In July, 1948, the trial court found that the Negro law school was substantially equal and denied Wrighten's injunction. (Opinion unreported.)

Bluford v. Canada, 32 F. Supp. 707 (W.D. Mo. 1940; appeal dism. 119 F. (2d) 779) denied damages for refusal to admit Bluford to U. of Missouri School of Journalism.

State (Bluford) v. Canada, 348 Mo. 298, 153 S. W. (2d) 12 (1941) denied mandamus to admit Bluford to Missouri Journalism School.

State (Michael) v. Witham, 179 Tenn. 250, 165 S. W. (2d) 378 (1942), following the Gaines case, denied a mandamus to compel the admission of a Negro to Tennessee University.

Jennings v. Board of Trustees, Hearne Ind. School Dist. (W.D. Tex. 1948, unreported). A suit to compel entrance of Negro students to white high school. A declaratory judgment was entered considering the Texas Constitutional provisions for separate schools and the equal protection clause of the 14th Amendment. It concludes, "Under the above provisions, the defendants are required to furnish separate, but impartial and substantially equal facilities to both Negro and white students."

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue.	Decision
Federal:			
	Wong Him v. Callahan 119 Fed. 381	Constitutionality of separate schools for Chinese children.	The separate school being equal, the separation does not violate the 14th Amendment.
	U. S. v. Buntin 10 Fed. 730	Indictment for deprivation of right to attend non-segregated school.	Ohio statute providing for separate schools, if schools are substantially equal, does not violate 14th Amend.
	Bertonneau v. Board of Directors 3 Fed. Cases 294	Constitutionality of separate schools for Negroes.	The separate school being equal the separation does not violate the 14th Amendment.
Alabama:			
	State v. Bd. of School Commissioners, 145 So. 575 (1933)	To obtain admission to white school.	Separation of children in schools is mandatory under statute.
Alaska:			
	Sing v. Sitka School Bd., 7 Alaska 616 (1927)	Constitutionality of separate schools for Negroes and Indians.	The separate school being equal the separation does not violate the 14th Amendment.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Arkansas:			
	State v. Board of Directors, 242 S. W. 545, Cert. Den. 264 U. S. 567 (1922)	To obtain admission to white school; plaintiff claimed no Negro blood.	Separation is proper and ruling of school board supported by evidence will not be disturbed.
	Maddox v. Neal, 45 Ark. 121 (1885)	Constitutionality of separate schools for Negroes.	The separate school being equal the separation does not violate the 14th Amendment.
Arizona:			
	Burnside v. Douglass School, 261 Pac. 629 (1928)	Constitutionality of separate school for Negroes.	The separate school being equal, the separation does not violate the 14th Amendment.
	Dameron v. Bayless, 126 Pac. 273 (1912)	Same as above.	Same as above.
	Harrison v. Riddle, 36 P. 2d 984 (1934)	Mandamus to compel separation by school board.	Where substantially equal school is provided school board must separate pupils.
California:			
	Ward v. Flood, 48 Cal. 36 (1874)	Constitutionality of separate schools for Negroes.	The separate school being equal, the separation does not violate the 14th Amendment.

Dist. of Columbia:		
Wall v. Oyster, 36 App. D.C. 50 (1910)	To contest being sent to separate school when there was no notice of statute providing for separate schools.	Statute is not invalid for lack of notice. Board may assign to separate school.
Florida:		
State v. Bryan, 39 So. 929 (1905)	To test the constitutionality of the white university, when there was no similar Negro institution.	As long as Negroes have a State Normal, it is not unconstitutional to place the white normal in a university.
Georgia:		
Blogett v. Bd. of Ed., 30 S. E. 561 (1898)	To restrain appropriation for white high school when there was no appropriation for Negro high school.	Wrong action. No benefit to Negroes by attacking white high school. Action should be to compel a high school for Negroes.
Cummings v. Bd. of Ed., 29 S. E. 488, Aff'd 175 U. S. 528 (1898)	Same as above.	Same as above.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Indiana:			
	Cory v. Carter, 48 Ind. 327 (1874)	To contest separate schools.	A classification which does not exclude either class from equal accommodations is no infringement of rights.
	Greathouse v. School Board, 151 N. E. 411 (1926)	To prevent construction of separate high school as unlawful expenditure.	The separate school being equal, the separation does not violate the 14th Amendment.
	State v. Gray, 93 Ind. 303 (1884)	To obtain admission to white high school.	The constitutionality of the law for the establishment of separate schools for white and Negro children is settled.
	State v. Grubbs, 85 Ind. 213 (1882)	To compel town to organize school for negroes.	To require Negro to attend near-by separate school was proper.
	State v. Wirt, 177 N. E. 441 (1931)	To contest an alleged discrimination in separate schools.	Organization of separate schools must not result in denying equal privileges; but here no denial is shown.
Kansas:			
	Reynolds v. Board of Education, 72 Pac. 274 (1903)	To test constitutionality of separate schools.	Separate schools do not violate the 14th Amendment.
	Richardson v. Board of Education, 72 Kan. 629 (1906)	Same as above	Same as above.

Kansas—Cont'd.		
Wright v. Board of Education of Topeka, 284 Pac. 363 (1930)	To prevent transfer to Negro school because plaintiff had to pass white school to reach Negro school.	Separate schools, substantially equal are constitutional; inequality shown by plaintiff.
Kentucky:		
Board of Education v. Bunger, 41 S. W. 2d 931 (1931)	To contest the establishment of separate schools.	Board of Education has the power to establish separate schools.
Davies Co. Bd. v. Johnson, 200 S. W. 313 (1918)	To obtain identical facilities.	Facilities need not be identical if they are equal.
Grady v. Bd. of Education, 147 S. W. 928 (1912)	To contest the establishment of separate schools.	Board of Education has the power to establish separate schools.
Mullins v. Belcher, 134 S. W. 1151 (1911)	To test constitutionality of separate schools.	The separate school being equal, the separation does not violate the 14th Amendment.
Prowse v. Board of Education, 120 S. W. 307 (1909)	To contest the establishment of separate schools.	Board of Education has the power to establish separate schools.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Maryland:			
	Williams v. Zimmerman, 192 Atl. 353 (1937)	To obtain admission to white school.	Negro student cannot be admitted to white school; substantially equal Negro school being provided.
Massachusetts:			
	Roberts v. City of Boston, 5 Cush. (Mass.) 198 (1849)	To obtain admission to a white school.	School Board has the power to separate Negro and white students. Admission denied.
Mississippi:			
	Barrett v. Cedar Hill S. D., 85 So. 125 (1920)	To contest bond issue for consolidated school because discriminatory.	Since there are ample substantially equal schools for Negroes they cannot contest establishment of school for whites.
	Bond v. Tij Fung, 114 So. 332 (1927)	To obtain admission of Chinese boy in white school.	The separate school being equal, the separation does not violate the 14th Amendment.

Mississippi—Cont'd.		
Bryant v. Barnes, 106 So. 113 (1925)	To contest an alleged discrimination in establishing school districts.	Court will prohibit discrimination between races in the operation of the schools, but no discrimination is shown by separation.
Chrisman v. Town of Brookhaven, 70 Miss. 477 (1893)	To test the constitutionality of separate schools.	The separate school being equal, the separation does not violate the 14th Amendment.
Missouri:		
Lehew v. Brummell, 15 S. W. 765 (1891)	To set up discrimination between white and Negro schools.	Schools being substantially equal there was no discrimination.
State v. Cartwright, 99 S. W. 48 (1907)	To test constitutionality of separate schools.	Separate schools do not violate 14th Amendment.
New York:		
People v. Gallagher, 93 N. Y. 438 (1883)	To contest separate schools.	When statute provides for separate, equal schools, excluding Negroes from white schools is constitutional.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
New York—Cont'd.	People v. Gaston, 13 Abb. (N. Y.) Pr. N. S. 160 (1872)	Same as above.	Same as above.
North Carolina:	Bonitz v. Trustees, 70 S. E. 735 (1911)	To test constitutionality of tax for white schools only.	Separate schools are constitutional when substantially equal hence tax must be construed as applying to both white and negro schools.
	Johnson v. Bd. of Education, 82 S. E. 832 (1914)	To contest constitutionality of separate schools.	Advantages being equal separate schools are constitutional.
	Lowry v. Sch. Trustees, 52 S. E. 267 (1905)	To contest alleged discrimination in separate schools.	Separate schools, substantially equal, are constitutional, no discrimination shown.
	McMillan v. School Committee, 107 N. C. 609 (1890)	To compel school committee to admit Negroes.	Statute requiring separate schools was binding on Committee.

North Carolina—Cont'd.		
Whitford v. Bd., 74 S. E. 1014 (1912)	To get interpretation of constitutional provisions of separate schools.	Statute providing for substantially equal school would be constitutional.
Puitt v. Gaston Co., 94 N. C. 709 (1886)	To test constitutionality of separate schools.	Advantages being equal, separate schools are constitutional.
Smith v. Robersonville, 53 S. E. 524 (1906)	To contest alleged discrimination in separate schools.	Separate schools, substantially equal, are constitutional; no discrimination shown.
Nevada:		
State v. Duffy, 7 Nev. 342 (1872)	To restrain board from separating white and Negro students.	The separate school being equal, the separation does not violate the 14th Amendment.
Ohio:		
State v. Bd. of Education, 7 Ohio Dec. 129 (1876)	To contest alleged discrimination in separate schools.	Separate schools, substantially equal, are constitutional; no discrimination shown.
State v. McCann, 21 Ohio St. 198 (1871)	To contest separate schools.	Establishment of separate schools substantially equal is constitutional.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Oklahoma:			
	School District v. Board, 275 Pac. 292 (1928)	To recover State Aid Funds from Board of County Commissioners.	Separate schools with like conditions must be provided and impartially maintained.
	Jumper v. Lyles, 185 Pac. 1084 (1921)	To prevent certain schools being designated Negro schools.	The Board has the power to determine which separate school shall be attended by white or Negro students.
	State v. Albritton, 224 Pac. 511 (1924)	To test constitutionality of separate schools.	Facilities being substantially equal, separate schools are constitutional.
Pennsylvania:			
	Commonwealth v. Williamson, 30 Leg. Int. 406 (Pa. 1873)	To contest exclusion from public schools.	Under statute if twenty Negro children appeared for admission a separate school may be established.
South Carolina:			
	Tucker v. Blease, 81 S. E. 668 (1914)	To prevent exclusion of Negro from white school.	School Board may set up separate school for these persons and if substantially equal it is constitutional.

Tennessee:		
Greenwood v. Rickman, 235 S. W. 425 (1921)	To test separate schools as discriminatory, for tax purposes.	When equal opportunities are given in free schools there is no discrimination in taxes.
Virginia:		
Eubank v. Boughton, 36 S. E. 529 (1900)	To compel admission to white schools.	The duty is upon the school board to provide separate schools. Admission denied.
West Virginia:		
Martin v. Board of Education, 26 S. E. 348 (1896)	To test constitutionality of separate schools.	The separate school being equal, the separation does not violate the 14th Amendment.

THE TEXAS POLL

The Statewide Survey of Public Opinion
Joe Belden, Director
Release Sunday, January 26, 1947
Austin, Texas

Austin, Texas, Jan. 25.—Most Negroes agree with the overwhelming sentiment of the white population in Texas that the Legislature should provide colored students with a first-class university of their own instead of allowing them to enter the University of Texas.

Negroes vote 8 to 5 in favor of a separate university, as compared with a ratio of more than 25 to 1 among eligible white voters.

The Texas Poll put the question to a representative cross section of adults in this form:

> "Under a Supreme Court ruling, Texas is faced with the problem of either setting up a first-class university for Negroes or allowing them to enter the University of Texas. What do you think ought to be done?"

Here are the results, broken down to show the opinions of the 86 per cent of the people who are white and the 14 per cent who are Negroes:

	White	*Negro*
Set up separate university	79%	8%
Allow them in U. T.	3	5
Ignore court ruling	1	
Don't Know	3	1
	86%	14%

Allegiance to Southern traditions and fear of racial troubles are the main reasons why whites favor a separate university for Negroes. Negroes who prefer a university of their own say: (1) Negroes aren't interested in going to school with whites; (2) Negroes should be by themselves anyway; (3) Negroes want good training and where they get it doesn't matter.

Whites and Negroes who think the University of Texas' doors should be opened to colored students maintain that the establishment of a separate university for Negroes would be too great a financial burden on the state.

Representative comments: White—"Too much money would be spent to benefit too few." Colored—"To have one university would be cheaper for the state."

Among the few who think Texas should ignore the Supreme Court's ruling, opinion seems to be that Negroes ought not to go to universities at all, or that there are not enough Negroes who want higher education for anyone to worry about.

In this survey, as in all scientific samplings by The Texas Poll, every person gave his opinion in strict confidence. To encourage Negro respondents to voice their opinions freely, the Poll uses trained colored interviewers to contact a cross section of their race.

Report of Regents of Texas State University for Negroes to Governor

Houston 2, Texas, February 12, 1949.

Hon. Beauford H. Jester,
Governor of Texas,
Austin, Texas.

Dear Governor Jester:

As Chairman of the Board of Directors of The Texas State University for Negroes, I submit a report on the operation of this University from its founding in 1947 to the present time.

Creation of the University

The University was created by an Act of the Fiftieth Legislature known as Senate Bill 140, which was approved on March the 3rd, 1947. This Act provided for the following basic items:

(1) "The establishment, support, maintenance and direction of a University of the first class for the instruction and training of the colored people of this State."

(2) Expressed the policy that the Legislature deemed it impractical to establish a college or branch of the University of Texas for the instruction of colored youth. "Therefore, it is the purpose of this Act to establish an entirely separate and equivalent University of the first class for Negroes, with full rights to the use of tax money and the general revenue fund for establishment, maintenance, erection

of buildings and operation of such institution as provided in Section 48, Article III of the Constitution of the State of Texas."

(3) Courses in Agriculture, the Mechanic Arts and Engineering shall be offered at the Prairie View Agricultural and Mechanical College. "The Texas State University for Negroes shall offer all other courses of higher learning, including, but without limitation (other than as to those professional courses designated for the Prairie View Agricultural and Mechanical College), Arts and Sciences, Literature, Law, Medicine, Pharmacy and other professional courses, all of which shall be equivalent to those offered at the University of Texas."

(4) "The Directors are hereby authorized and required to organize said University as soon as practicable and to take such action as may be deemed necessary in perfecting the organization of said institution as a University of the first class for the instruction and training of the colored people of this State."

(5) In declaring the existence of an emergency, the Act noted "the fact that the people of Texas desire that the State meet its obligation of equal educational opportunities for its Negro citizens." Thus not only is an emergency technically declared but the actual emergency is recognized and the acceptance by the State of its obligation to its Negro citizens is definitely declared and accepted by the Legislature.

Pursuant to the provisions of the Act of Establishment of the University, the Governor appointed

a Board of Directors which was sworn into office on May 7, 1947.

Development of Plans for Opening The University

Among the items which had to be handled very rapidly to be prepared for the opening of the University, the following problems had to be met:

(1) The arrangements had to be made for the transfer of the properties of the Houston College for Negroes to this University. In addition to the task of negotiating a satisfactory contract with the University of Houston, arrangements had to be made for a complete audit of the financial status of the Houston College for Negroes by a firm of Certified Public Accountants. The Accountants required that a recognized firm of appraisal engineers be employed to evaluate the real estate, buildings and equipment being transferred.

(2) The faculty and staff of administrators and other employees of the Houston College had to be built up to meet the needs of a University of the first class in so far as it was possible to do so for the first year.

(3) Orders and requisitions had to be prepared for the purchase of necessary equipment and supplies for the establishment of the University.

(4) Arrangements had to be made for additional buildings to meet the anticipated enrollment demands, for the construction of roads and walkways, and for the expansion of utilities on the campus.

(5) Accounting procedures and methods of operating the institution had to be changed from the methods used by private educational institutions to those used in State Institutions. . . .

Opening of the University

(1) While the transfer of the Houston College to this University was not actually effective until September 1, 1947, excellent cooperation was had from the University of Houston in the working out of many problems prior to that date by the use of Local Funds of the Houston College for Negroes. The net value of assets so transferred amount to $1,020,007.81.

(2) Registration began on September 8, 1947 and 2303 students enrolled for the first semester. When the Bill was before the Legislature for the appropriation of funds for the University, it was estimated that the enrollment would be between 750 and 1000.

(3) With the beginning of classes on September 15, 1947, the teacher problem had been solved with a very few minor exceptions which were worked out as soon as possible after the student load had been determined. A large part of the faculty for the first year was taken over from the Houston College. It was difficult to employ personnel of high experience and rank because of the fact that people of those qualifications usually complete their contracts for the following year in the months of April and May.

(4) With the opening of school, the University had accessible for use the following buildings: The Fairchild Building, which had been completed about six months previously at a cost of approximately $320,000; one large corrugated metal automobile shop instruction building, which had been erected at a cost of approximately $22,000; five shop buildings which had been built by the Vocational Section of the Houston College for their use; twelve frame buildings which had been moved from Camp Wallace.

Plant Improvements Since the Opening of the University

(1) Arrangements were made with the Federal Housing Administration for the immediate erection of eighty-four apartments for housing of married Veteran students. These were completed in January of 1948.

(2) Contract was let for the building of an Administration & Class Room Building and Auditorium on June 7, 1948, at a cost of $1,637,000, which does not include architect's fees or equipment. Progress on this building has been up to schedule, and a portion of it may be ready for occupancy by September 1, 1949. This building will provide facilities for the Library and the Law School until such time as special buildings for these can be provided Among the new buildings presently recommended by the Board of Directors and approved by the State Board of Control is a separate law school building.

(3) On June 14, 1948, contract was let for a five-room residence to be used as temporary residence for the President, and as the permanent residence for the Superintendent of Buildings and Grounds. This residence was completed and occupied on September 15th.

(4) Contract was let for the construction of a Home Economics Practice Building on November 16, 1948, at a contract price of $30,944. Progress on this building is very satisfactory with completion scheduled for April 1, 1949. The building was designed to meet the requirements of the Home Economics Division of the State Board for Vocational Education.

(5) On December 14th, contract was let for the construction of the permanent home for the President, at a cost of approximately $40,000.

(6) Seven additional buildings were secured from Camp Wallace through the War Assets Administration, and were re-erected on the campus during the summer and early fall of 1948. Two other buildings were also secured and were dismantled so that materials would be available for remodeling, improving and expanding the units moved in and the frame units already on the campus.

(7) Large quantities of permanent equipment have been provided through both Local Funds and State Appropriated Funds. Additional equipment is needed to meet the rapidly expanding demands for courses of all kinds, particularly in the field of Sciences.

Graduates From the University

(1) At the close of the Long Session of 1947-48, sixty-six students received diplomas, thirty-six for Bachelors degrees and thirty for Masters of Science in Education.

(2) At the close of the summer session in August of 1948, degrees were awarded to 68 Bachelors of Arts, 19 Bachelors of Science and 65 Masters of Science in Education. The total enrollment for the summer school was 1747 for the first term and 1619 for the second term.

Registration, 1948-1949

(1) The total registration for the first semester of the scholastic year 1948-49 was 2032, 211 being registered in the Graduate School and 25 in the School of Law, which was moved to Houston on September 1st, 1948.

(2) In the School of Law, the total enrollment is now 23 students consisting of 21 first year and 2 second year students. The faculty of the School of Law consists of a full time Dean, four full time professors, and a Librarian.

(3) Registration is now in process for the second semester and indications are that there will be a higher enrollment of new students than we have had any reason to expect. This is an indication of the trend of the attitude of the Negro people of Texas toward the University and its ultimate accomplishment of the purpose for which it was created.

Faculty of the University

At the present time the University has a total of one hundred fifteen persons on the teaching staff in addition to the administrative and operative personnel. The President of the University is a Doctor of Education, and there are seventeen Doctors of Philosophy on the staff. We do not know of another educational institution with a student body of two thousand that has eighteen faculty members holding Doctors degrees on its staff.

Inspections and Approval

(1) The representatives of the Southern Association of Colleges and Secondary Schools made a formal inspection of the University on November 9th and 10th, 1948. The University was notified under date of December 13th that it had been approved by the Association as a Class "A" Four-Year Educational Institution. This approval was accomplished in one year and three months from the effective date of the establishment of the University.

(2) The State Board of Law Examiners made an inspection of our Law School in September of 1948 and recommended approval as a first class Law School in October, 1948. The letter of notification said, in part: "That in all respects it complied with requirements of the rules; that is, the Library was far in excess of such requirements and in fact was a very fine one; also, that it had a splendid faculty."

Negotiations are under way for a formal inspec-

tion at an early date by representatives of the American Bar Association. The Board has reason to believe that the Law School will meet all of the requirements of the American Bar Association when this inspection is made, for Mr. John G. Hervey, Advisor to the Section of Legal Education of the American Bar Association, stated in a recent letter:

> "Certainly your institution has an opportunity to develop a law school the like of which exists in no other state—an outstanding, top-notch institution, which, through the years, should attract outstanding teachers and students of ability from all parts of the Union. The legislature and regents appear to have been most generous in their appropriation for library materials and I gather from what Dean Johnson tells me that the plant now under construction will be eminently satisfactory. There is no reason why your institution cannot and should not enjoy full approval by the American Bar Association because you certainly have no insuperable problems."

Establishment of the University An Expensive Process

This Board of Directors has found that establishment of this University has been more expensive than would have been expected normally because of a number of factors which do not enter into the establishment and growth of the ordinary school, some of which are as follows:

(1) Whole departments had to be established in a full grown status rather than expanded over a

period of years, the School of Law and the School of Pharmacy being typical examples of this situation.

(2) Since the Legislature specified that "upon demand being made by any qualified applicant for any present or future course of instruction offered at the University of Texas or its branches, such course shall be established or added to the curricula of the appropriate division of the school hereby established," limitation cannot be placed on the minimum number of students in any particular class. Some of the higher classes are small but must be and are taught by highly qualified teachers.

(3) In keeping with the obligation that the University shall be substantially equal to the University of Texas, the Board of Directors adopted the following resolution as expressing the policy of this University in regard to the scale of pay:

> "RESOLVED That the Board of Directors instructs the Finance Committee to use the minimum salary scale of the University of Texas for all Instructional employees and apply the same as a minimum in the building of the budget for The Texas State University for Negroes for the year 1947-48; it is the sense of this Board that given equality of training, experience, professional attainment and responsibility, there shall be equality of financial remuneration."

This policy established the scale of pay as well above that paid by most other Negro educational institutions. To offset the additional expense we

were enabled to employ outstanding teachers in the various fields.

(4) The necessity for having qualified persons in all the major departments made it essential that we have a Doctor of Philosophy as the head of each of the major departments in the University. This definitely increased the unit cost of instruction, particularly in the third and fourth years and in graduate work, above the cost of other comparative institutions.

(5) In order to operate a University of the First Class, it was necessary that our Library be built up. This has been accomplished in so far as the Law School is concerned, and the Southern Association has given us approval of our Main Library for under-graduate work.

(6) In addition to the facilities offered here, approximately $33,000 was expended during the year 1947-48 in grants of Scholarship Aid which have been made to Negro students for graduate and professional study outside of Texas.

Very truly yours,

(Sgd) CRAIG F. CULLINAN,
Chairman.

Report of State Auditor to Governor

February 11, 1949.

Honorable Beauford H. Jester, Governor
Members of the Legislature, and
Board of Directors of
The Texas State University for Negroes

Gentlemen:

We are pleased to present this report on the operations of

The School of Law
of
The Texas State University
For Negroes
To January 31st, 1949

This audit was required under the General Provisions of House Bill No. 246 as passed by the 50th Legislature, and our authorization is in Article 4413a-13, Revised Civil Statutes of Texas.

For the period from March 3rd, 1947, until August 31st, 1948, the affairs of the School of Law were administered by the Board of Regents of The University of Texas, and the School was conducted in the City of Austin, Texas. On September 1st, 1948, the School of Law and its physical assets were moved to the campus and buildings of The Texas State University for Negroes at Houston, Texas, which has its own Board of Directors.

The School of Law for The Texas State University for Negroes was established pursuant to Sen-

ate Bill No. 140 of the 50th Legislature (1947). Section 11 of that Act provides: (Quotation of statute omitted since it is copied in full herein at page 110.)

The formal announcement of courses promulgated by the Dean of the School stated that: (These are omitted because they are set out in full R. 371-372.)

Although this School of Law was formally opened for registration on March 10, 1947, no students presented themselves for enrollment. Nevertheless, the School was kept in order and at the beginning of the Fall Term in September, 1947, three applicants presented themselves for enrollment. All were accepted and work was begun. Thereafter, for personal reasons one student withdrew. The others continued their studies in the School of Law until it was moved to Houston, as directed by the statute, at the end of the Summer Session in August, 1948.

While the Law School was located in Austin, the students were taught (as "announced" above) by professors who were teaching or had taught the same courses in the School of Law at The University of Texas, and the curriculum was the same as that for students beginning in the School of Law of that University. In addition to the law books on hand at the School, the State Library (of the Supreme Court of Texas) and the library of The University of Texas were readily available to and were used by the students.

There were 2,303 students who registered at the Texas State University for Negroes in Houston in September, 1947. In September 1948 the total enrollment was 2,032 of whom 23 were in the School of Law. There are now 21 in that School—of these, 16

hold college degrees and the other 5 are otherwise properly qualified students.

On January 31st, 1949, there were 1,981 students in The Texas State University for Negroes, and there was a teaching staff of 110, of whom 37 were teachers of Industrial and Vocational-Technical Education. There is also a full complement of administrative and operative personnel. The University's President is a Doctor of Education, and there are 17 Doctors of Philosophy on the staff. On December 13th, 1948, the University was notified that it had been approved by the Southern Association of Colleges and Secondary Schools as a Class "A" institution. Further details of the operation of the University as a whole are contained in our audit report thereon which was released under date of January 15th, 1949.

The University for Negroes School of Law, in addition to clerical employees, has a Dean, four professors, and a librarian who also teaches one course. All of them are employed full time. All of the professors of the School of Law, as well as the Dean, hold LL.B. Degrees. They are paid salaries as follows: Dean (12-month basis), $7,500.00; 3 professors, $550.00 per month for 9 months; 1 professor, $500.00 per month for 9 months; and the librarian, $4,000.00 for 9 months. By resolution of its Board of Directors, The Texas State University for Negroes uses the same minimum salary scale for instructional employees as is used by The University of Texas.

There are 16,371 bound volumes and numerous pamphlets, journals, etc., now in the Law School Library at Houston, and 772 volumes in warehouses

are awaiting transfer to it. Orders have been placed for approximately 1,046 additional bound volumes, together with various subscriptions and periodicals. For these books, etc., invoices in the amount of $48,843.27 have been paid and purchase orders amounting to an additional $21,128.35 have been issued (to be paid partly from the remaining original appropriation and partly from the University for Negroes funds).

In October 1948 the Texas State Board of Law Examiners approved the School of Law at the Texas State University for Negroes. The following is quoted from the Minutes of the October 1948 meeting of that Board:

> "Mr. Neathery reported having investigated, as provided by the rules, the Law School of the State University for Negroes and that he found that in all respects it complied with the requirements of the rules; that its library was far in excess of such requirements and in fact was a very fine one; also, that it had a splendid faculty. Thereupon, a motion was duly made and carried by unanimous vote that such school be approved by the Board and that the Chairman be directed to write Dean Ozzie L. Johnson to that effect, with copy to President Lanier."

Expenditures by The University of Texas out of the original appropriation of $100,000.00 for the School of Law have been as follows: (Details of audit are omitted in the interest of brevity.)

Expended for	Total
Salaries and Wages:	
Teaching	$ 9,600.57
Librarian and Assistants	2,503.93
Other	393.60
Materials, Labor and Supplies	291.90
Office Expense	149.89
Telephone and Telegraph	114.71
Rent	2,250.00
Library Books	48,695.42
Equipment	593.17
Insurance	81.60
Total Expended	$ 64,874.79

It appears that the money appropriated for this University's School of Law has been and is being expended substantially in accordance with the intent of the Legislature.

Very truly yours,
C. H. Cavness,
State Auditor.

Letter From Dean to Governor

The Texas State University for Negroes
School of Law
Austin, Texas
January 27, 1948.

Hon. Beauford H. Jester
Governor of the State of Texas
Austin, Texas.

My dear Governor Jester:

In reply to your request of January 23, 1948, I submit the following report concerning the status

of the Law School for the Texas State University for Negroes.

The School of Law was organized and ready to begin its program of instruction on March 10, 1947, but no qualified applicants presented themselves until the opening of the current semester on September 22, 1947. At that time applications were received from three students eligible for admission, all of whom were registered. One of these students withdrew during the semester for personal reasons so that our present enrollment is two. It is anticipated that two or more beginning students will register for the second semester on February 2, 1948.

The program of work given during the winter semester included Contracts, Torts, Personal Property, Procedure I and Legal Bibliography, being the same courses offered to beginning students at the University of Texas Law School.

All instructors are assigned from the faculty of the University of Texas and with one exception, indicated by administrative convenience, teach the same courses currently given by them at the University of Texas. Effort is exerted toward the full realization of such pedagogical advantages as inhere in a high teacher-student ratio. The same casebooks and other materials are used in each course at the University of Texas and this school.

The school occupies the first floor of a building adjoining the grounds of the State Capitol. There are three rooms sufficiently large to meet all anticipated needs for the current year and adequate restroom facilities are provided both men and women.

Professors were asked to select out of books on hand those desired for instruction in the first year work and these books have been shelved in the building. Other books purchased and in storage will be moved to the building as and when desired by instructors.

The Texas Supreme Court Library containing approximately 42,000 volumes and the State Library containing several thousand law books are used by our students when the need arises. The Library of the University of Texas Law School lends any materials desired and maintains a messenger service for delivering and returning such materials.

With highest esteem and best regards,

Yours sincerely,

/s/ C. T. McCormick, Dean.

Filed, Paul H. Brown, Secretary of State
Jan. 31, 1948

Points of Error Assigned in the Texas Court of Civil Appeals by Petitioner

"Points Upon Which the Appeal Is Predicated

"First Point: The error of the Court in sustaining appellees' special exception to allegation 3 of appellant's second supplemental petition.

"Second Point: The error of the Court in excluding the testimony of the witness, Dr. Charles H. Thompson, with reference to the quantity and quality of education offered at the universities and colleges, other than Prairie View College, maintained

by the State of Texas (S. F. beginning with the last question on p. 387 to p. 469, inclusive).

"Third Point: The error of the Court in excluding the evidence of the appellant as to the admission of Donald Murray to the law school of the University of Maryland and the results thereof in a situation analogous to the instant case, as shown in appellant's bill of exception, as fully set out (S. F. pp. 478-482).

"Fourth Point: The error of the Court in holding that the proposal of the State to establish a racially segregated law school afforded the equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and thus justified the denial of appellant's petition for admission to the law school of the University of Texas."

Points of Error Assigned by Petitioner in the Supreme Court of Texas on Application for Writ of Error

"Points of Error

"FIRST POINT: The error of the Court of Civil Appeals in sustaining respondent's special exception to Allegation 3 of petitioner's second supplemental petition (paragraph 3 of petitioner's second supplemental petition) (Tr. page). (Germane to Assignment of Error No. 1.)

"SECOND POINT: The error of the Court of Civil Appeals in sustaining the trial court's action in excluding the testimony of the witness, Dr. Charles H. Thompson, with reference to the quantity and quality of education offered at the universities and

colleges, other than Prairie View College, maintained by the State of Texas. (S. F. beginning with the testimony on page 380 and ending on page 469, inclusive.) (Germane to Assignment of Error No. 2.)

"THIRD POINT: The error of the trial court in excluding the evidence of the petitioner as to the admission of the witness, Donald Murray, to the Law School of the University of Maryland, and the results thereof in a situation analogous to the instant case as shown in petitioner's bill of exceptions as fully set out. (S. F. beginning on page 478 to page 482, inclusive.) (Germane to Assignment of Error No. 3.).

"FOURTH POINT: The error of the Court of Civil Appeals in holding that the proposal of the State of Texas to establish a racially-segregated law school afforded the equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and thus, justified the denial of petitioner's application for admission to the Law School of the University of Texas. (Germane to Assignment of Error No. 4.)

"FIFTH POINT: The error of the Court of Civil Appeals in affirming the trial court's judgment, and not holding that Article VII, Section 7 of the Constitution of Texas was not unconstitutional, in that the enforcement thereof against petitioner denied to the petitioner that equality required by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and thus held that respondents had the legal authority, under such Article of the Constitution, to deny petitioner admission to the Law School of the University of Texas. (Germane to Assignment of Error No. 5.)

"SIXTH POINT: The error of the Court of Civil Appeals in failing to hold that Article VII, Section 7 of the Texas Constitution and the Laws of Texas

enacted pursuant thereto, segregating races solely on account of race and color, were based upon no real distinction or actual difference; and, therefore, violated the petitioner's rights under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. (Germane to Assignment of Error No. 6.)

"SEVENTH POINT: The error of the Court of Civil Appeals in ignoring the expert testimony introduced by petitioner, and merely adopting respondents' interpretation of the evidence by attaching to its opinion, an appendix copied in the main from respondents' brief, basing its opinion and judgment on said respondents' brief without making an independent evaluation of the record as to the comparative values of the two law schools as a basis for its opinion and judgment. (Germane to Assignment of Error No. 7.)

"EIGHTH POINT: The error of the Court of Civil Appeals in holding that the question of whether segregation in a state-supported school is a denial of the due process of law is no longer an open question because in so holding, the Court thereby erred in not considering petitioner's contention that the action of the respondents denied petitioner the equal protection of law guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution of the United States. (Germane to Assignment of Error No. 8.)

"NINTH POINT: The error of the Court of Civil Appeals in holding that petitioner was not entitled to the relief sought, and that the judgment of the court below should be affirmed; and citing as a basis for said judgment and opinion, the opinions of the Supreme Court in the cases of Plessy vs. Ferguson and Hall vs. DeCuir as the grounds for said judgment and opinion, for the reason that said decisions

were based upon records in which there was no evidence of the inequality interest in segregated facilities, and were predicated upon a purely abstract and theoretical hypothesis, wholly unrelated to the realities, and for the further reason that the record in this case demonstrates, for the first time in any case presented for decision, the inevitable inequalities in a segregated public school system. (Germane to Assignment of Error No. 9.)"

Constitutional and Statutory Provisions of Texas Providing for Separate Schools for White and Negro Students

Constitutional Provisions

Article VII, Section 7: "Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both."

Article VII, Section 14: "The Legislature shall also when deemed practicable, establish and provide for the maintenance of a College or Branch University for the instruction of the colored Youths of the State, to be located by a vote of the people: Provided, that no tax shall be levied, and no money appropriated, out of the general revenue, either for this purpose or for the establishment, and erection of the buildings of the University of Texas."

Statutory Provisions[1]

Article 2719: "Said board (of education) shall provide schools of two kinds: those for white children and those for colored children. Such schools re-

[1] Texas Civil Statutes (Vernon 1948). There are other related statutes. The above are representative.

spectively, shall be free to all such children over six years of age. . . ."

Article 2900: "All available public school funds of this State shall be appropriated in each county for the education alike of white and colored children, and impartial provisions shall be made for both races. No white children shall attend schools supported for colored children, nor shall colored children attend schools supported for white children. The terms 'colored race' and 'colored children,' as used in this title, include all persons of mixed blood descended from negro ancestry."

Article 2643b (referred to in the brief as S. B. 140, 50th Leg., 1947, Ch. 29):

"Section 1. The Legislature of Texas deems it impracticable to establish and maintain a college or branch of the University of Texas for the instruction of the colored youths of this state without the levy of taxes and the use of the general revenue for the establishment, maintenance and erection of buildings as would be required by Section 14 of Article VII of the Constitution of Texas, if such institution were established as a college or branch of the University of Texas. Further, the Legislature of Texas deems that establishment of a negro university with such limitations as to funds and operation would be unfair and wholly inadequate for the purpose of providing an equivalent university of the first class for negroes of this state. Therefore, it is the purpose of this Act to establish an entirely separate and equivalent university of the first class for negroes with full rights to the use of tax money and the general revenue fund for establishment, maintenance, erection of buildings and operation of such institution as provided in Section 48, Article III of the Constitution of the State of Texas."

"Sec. 2. To provide instruction, training, and higher education for colored people, there is hereby established a university of the first class in two divisions; the first, styled 'The Texas S' University for Negroes' to be located at Houston, Harris County, Texas, to be governed by a Board of Directors as provided in Section 3 hereof; the second, to be styled 'The Prairie View Agricultural and Mechanical College of Texas' at Prairie View, Waller County, Texas, formerly known as Prairie View University, originally established in 1876, which shall remain under the control and supervision of the Board of Directors of The Agricultural and Mechanical College of Texas. At the Prairie View Agricultural and Mechanical College shall be offered courses in agriculture, the mechanic arts, engineering, and the natural sciences connected therewith, together with any other courses authorized at Prairie View at the time of the passage of this Act, all of which shall be equivalent to those offered at The Agricultural and Mechanical College of Texas. The Texas State University for Negroes shall offer all other courses of higher learning, including, but without limitation, (other than as to those professional courses designated for The Prairie View Agricultural and Mechanical College), arts and sciences, literature, law, medicine, pharmacy, dentistry, journalism, education, and other professional courses, all of which shall be equivalent to those offered at The University of Texas. Upon demand being made by any qualified applicant for any present or future course of instruction offered at The University of Texas, or its branches, such course shall be established or added to the curriculum of the appropriate division of the schools hereby established in order that the separate universities for Negroes shall at all times offer equal educational opportunities and training as that available to other persons of this state. The Board of Directors of The Agricultural

and Mechanical College of Texas in administering The Prairie View Agricultural and Mechanical College of Texas shall in all respects have the same powers and perform the same duties in reference to this college as those conferred upon it by statute with reference to the government of The Agricultural and Mechanical College of Texas.

"Sec. 3. The government of the Texas State University for Negroes is hereby vested in a Board of Directors to be composed of nine (9) persons and to consist of both white and negro citizens of this state. (The balance of this Section is omitted since it deals only with tenure of Directors.)

"Sec. 4. (Omitted because it deals only with expenses of Board members.)

"Sec. 5. The Directors are hereby given the power and authority to select a site for the location of said University at the City of Houston, and are given the power, for and in behalf of the state, to acquire, take, appropriate, hold, and enjoy the title to such land and other property they may deem necessary for such purpose, either by purchase or otherwise. (The balance of the Section on eminent domain is omitted.)

"Sec. 6. As soon as a site for the location of said University is determined upon and acquired, it shall be the duty of the Directors to proceed with the construction of all necessary buildings and other permanent improvements thereon. . . . (Omitting provision relative to employment of architects and letting of contracts for construction.) The Directors are hereby authorized and required to organize said University as soon as practicable and to take such action as may be deemed necessary in perfecting the organization of said institution as a University of the first class for the instruction and training of the colored people of this state. The Directors shall

also have the authority to make proper arrangements by contract with other educational institutions, hospitals, and clinics at Houston for the use of such facilities and the services of qualified personnel as they may deem necessary and expedient for the proper training and education of students in professional courses.

"Sec. 7. The Directors shall establish the several departments in said University, determine the offices, professorships, and other positions at said institution, appoint a President, appoint the professors and other officers and employees and prescribe their duties, and fix their respective salaries; and they shall enact such by-laws, rules and regulations as may be deemed necessary for the successful management and government of the institution. They shall have the power, by and with the advice of the faculty, to prescribe and regulate the course or courses of instruction to be given at said institution, and to confer such degrees and to grant such diplomas as are now or may hereafter be granted by The University of Texas or any of its branches. The Directors shall have the power to remove any professor, instructor, tutor, or other officer or employee connected with the institution when, in their judgment, the best interests and proper operation of the institution shall require it.

"Sec. 8. The Directors are hereby authorized to accept, for and in behalf of the state, in connection with said University for Negroes, grants or gifts of property or money for the use of said institution from other than state sources.

"Sec. 9. There is hereby appropriated out of the State Treasury from any moneys not otherwise appropriated, the sum of Two Million ($2,000,000.00) Dollars or so much thereof as may be necessary, to be expended in the acquisition of land and other

property as a site for and in the establishment of the Texas State University for Negroes and for the construction, erection, acquisition, and equipping of buildings and other permanent improvements. There is further appropriated the sum of Five Hundred Thousand ($500,000.00) Dollars or so much thereof as may be necessary, for the support, operation, and maintenance of such institution, including the payment of salaries of its officers and employees, for each of the fiscal years of the biennium ending August 31, 1949.

"Sec. 10. In the interim between the effective date of this Act and the organization, establishment and operation of the Texas State University for Negroes at Houston, upon demand heretofore or hereafter made by any qualified applicant for instruction in any course (except law) offered at the University of Texas or any of its branches, the Board of Directors of the Agricultural and Mechanical College of Texas, acting as the governing board of the Prairie View Agricultural and Mechanical College, is authorized and required to provide forthwith such instruction, through courses, equivalent to the same instruction being offered at the University of Texas or any of its branches.

"There is hereby appropriated, as an emergency appropriation, the sum of One Hundred Thousand ($100,000.00) Dollars, or so much thereof as may be necessary, to be expended by the Board of Directors of the Agricultural and Mechanical College of Texas in order to make immediately available the facilities and personnel necessary to carry out the requirements of this section. Such emergency appropriation is for the remainder of the fiscal year ending August 31, 1947.

"At the end of the first term or semester of any course offered hereunder, after the organization and

establishment of the Texas State University for Negroes and the equivalent organization and establishment of such courses of instruction therein as may be offered during the interim at the Prairie View Agricultural and Mechanical College in accordance with the provisions of this Act, the direction, conduct, operations, location and property purchased hereunder for such courses shall be transferred to the Texas State University for Negroes, and its Board of Directors shall thenceforth continue such course as a part of the curriculum of such University and discharge all responsibility therefor.

"Regardless of the other provisions of this Act, the requirement for establishment of interim courses at the Prairie View University by the Board of Directors of the Agricultural and Mechanical College of Texas shall terminate on September 1, 1947. In the meantime, the Board of Directors of the Texas State University for Negroes shall make necessary temporary or permanent provisions to offer such courses beginning not later than September 1, 1947. For this purpose, and to cover all other expenses that may be necessary in the prompt establishment of the above and all other interim courses and the permanent establishment of such courses, as well as the organization and establishment of the Texas State University for Negroes, there is hereby appropriated as an emergency appropriation the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, or so much thereof as may be necessary, to be expended by the Board of Directors of the Texas State University for Negroes during the remainder of the fiscal year ending August 31, 1947.

"Sec. 11. In the interim between the effective date of this Act and the organization, establishment and operation of the Texas State University for Negroes at Houston, upon demand heretofore or hereafter made by any qualified applicant for instruction in

law at the University of Texas, the Board of Regents of the University of Texas is authorized and required to forthwith organize and establish a separate school of law at Austin for negroes to be known as the 'School of Law of the Texas State University for Negroes' and therein provide instruction in law equivalent to the same instruction being offered in law at the University of Texas. The Board of Regents of the University of Texas shall act as the governing board of such separate law school until such time as it is transferred to the control of the Board of Directors of the Texas State University for Negroes.

"There is hereby appropriated, as an emergency appropriation, the sum of One Hundred Thousand ($100,000.00) Dollars, or so much thereof as may be necessary, to be expended by the Board of Regents of the University of Texas in order to establish and operate the separate law school. The total of such emergency appropriation is for the remainder of the fiscal year ending August 31, 1947 and for the fiscal year ending August 31, 1948, or for such lesser time as the school is operated prior to the transfer hereinafter provided for. Students of the interim School of Law of the Texas State University for Negroes shall have use of the State Law Library in the Capitol Building in addition to other special library facilities which shall be made available, but the entire school shall be operated separately and apart from the campus of the University of Texas as provided in the Texas constitutional requirement of separate schools for white and colored youths.

"At the end of the first term or semester of any law course offered in said school after the organization and establishment of the Texas State University for Negroes at Houston, and the equivalent organization and establishment of a law course by such University for Negroes, the direction, conduct, oper-

ation, location, the unexpended balance of this appropriation, and all property purchased for the separate school out of the appropriation hereunder, shall be transferred to the Texas State University for Negroes at Houston, and its Board of Directors shall thenceforth continue such law courses as a part of the curriculum of such University and discharge all responsibility therefor. After such transfer the separate law school for negroes shall no longer operate in Austin or as a function of the Texas University Board of Regents, it being deemed impracticable to continue such operation in Austin after establishment of an equivalent school in Houston.

"Sec. 12. The term 'qualified applicant' as used in this Act shall mean any colored person who meets the educational requirements for entrance to the same course or courses in the University of Texas or any of its branches. The term 'colored person' has the same meaning as contained in the provisions of the Texas Constitution requiring separate schools, being the same interpretation placed thereon by the Legislature and administrative officials of this state since 1876, to-wit: a negro or person of African descent.

"Sec. 13. (Repealing clause.)

"Sec. 14. The fact that the people of Texas desire that the state meet its obligation of equal educational opportunities for its negro citizens from state supported institutions, and the fact that a separate and equivalent university of the first class for negroes cannot be established and maintained under the limitations and restrictions contained in Section 14, Article VII of the Constitution of Texas if such institution were made a college or branch of the University of Texas, and the fact that the only means of establishing an equivalent university of the first class for negroes with use of tax money and the gen-

eral revenue is to create a separate university entirely independent of the University of Texas, and the fact that interim courses must be established immediately by existing schools for the education of negroes prior to the establishment and operation of said separate university of the first class for negroes, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three separate days in each House be, and the same is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted."

Article 3221. "The Board (of Control) shall make all necessary rules and regulations for the government of the Deaf, Dumb and Blind Asylum for Colored Youths and Colored Orphans to comport as nearly as may be practicable with the rules and regulations of the asylums for like purposes in this State. . . ."

(The name of the above institution was changed from "The Deaf, Dumb and Blind Asylum for Colored Youths and Colored Orphans" to "The Texas Blind, Deaf and Orphan School" in 1947. (Acts 50th Leg., Ch. 292.)

BRIEF FOR RESPOND-ENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 44

HEMAN MARION SWEATT, *Petitioner*

v.

THEOPHILUS SHICKEL PAINTER, ET AL., *Respondents*

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 44

HEMAN MARION SWEATT, *Petitioner*

v.

THEOPHILUS SHICKEL PAINTER, ET AL., *Respondents*

BRIEF FOR RESPONDENTS

Preliminary Statement

The Court in many decisions has held that the States, which are under no duty under the Federal Constitution to furnish education to anyone, may provide education at their own expense for their white and Negro students in separate schools so long as equal facilities and advantages are offered both groups.

These holdings are eminently correct and should be followed. They rightly interpret the intention of Congress which proposed the Fourteenth Amendment and of the Legislatures of the several States

which adopted it. This Court has correctly decided that the education of the people in schools by State taxation is a matter belonging to the respective States; and that whether a State will furnish education at all, or in classrooms in which white and Negro students are mixed, or whether students will be separated, is to be determined by each State for the best interest of all its people. So long as each student is offered equal facilities and opportunities, none is denied the equal protection of the laws.

This Court's decisions further have correctly recognized that, where the necessity exists, the teaching of white and Negro students in separate classrooms is a reasonable exercise of the State's police power to preserve the public peace, harmony, and general welfare. The people of Texas in their Constitution, and the Legislature in statutes, have declared that such a necessity exists in Texas.

Petitioner here seeks to have the Court overturn its decisions, not only as applied to the graduate schools of universities, but also as applied to all public schools. If the theory of Petitioner and his *amici curiae* were followed, the Court would overrule all of its historic decisions under which the States separate persons of the two races in public sanitariums, schools for the deaf and blind, homes for the aged, and other institutions. He would have this Court annul by judicial decree the police power of the State to separate the races, even though equal facilities are offered both groups.

Petitioner and his *amici curiae* assume that the great justices who wrote or adopted the previous opinions of this Court were unable correctly to under-

stand and interpret the meaning of the Constitution. It is submitted that those justices not only comprehended the law but the thinking, feeling, and sentiments of the people. These decisions, correct in their holdings, have become ingrained into the society of a very large segment of the people of the United States and thousands of institutions have been established and maintained under their principles.

The determination of the desirability, expediency, or necessity of having separate or mixed schools in a particular community or State is a legislative matter. The arguments of Petitioner's sociologists and educators are properly addressable to the Legislative branch or to the people of a State, such as Texas, where the matter is deemed of such importance as to be written into the State Constitution.

Respondents therefore contend that the Constitutional questions in this case have been settled by well reasoned opinions of this Court which should be followed. If the Court decides to look behind those decisions, it will find that they correctly interpret the Fourteenth Amendment. And if the Court should determine to examine anew the question as to whether there is any reasonable basis for the classification of persons in the operation of public schools and colleges, it will find that the reasonableness of and the necessity for such constitutional or legislative action still exists today.

The above are believed to be the controlling, if not the only, issues before this Court for decision. As will be developed, Petitioner, who stated on the trial that he would attend no separate school however

equal it might be, did not present to the appellate courts of Texas the question of the sufficiency of the evidence to support the trial court's findings of fact that he was offered equal facilities. That finding of fact of the trial court as to the equality of the two separate law schools in question must therefore be considered as having been established, leaving only the law questions.

Even assuming the fact question to be before the Court, Respondents say that there is substantial evidence to support the trial Court's findings. Moreover, the supervening facts as to the Negro law school, occurring since the trial of this case, have so altered the situation that the Court may well consider that portion of the case moot.

Statement of the Case

The Courts of Texas, based on a long line of decisions by this Court, have held that the State may provide education for its white and Negro students at different institutions where it is shown that the facilities offered both groups are equal.

The admission of Petitioner, a Negro, to the Law School of The University of Texas was denied because of the sections of the Texas Constitution requiring separate equal schools.[1] His mandamus was denied by the trial court because of the above hold-

[1] Sections 7 and 14 of Article VII and related statutory provisions set out in Appendix to Respondents' original brief at page 109. To distinguish it from this brief, the brief filed by Respondents in opposition to the granting of the petition for certiorari will be referred to as "Respondents' Original Brief."

ings of this Court and because it found as a fact that the separate law school for Negroes offered Petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas." (R. 440.)

The Texas Legislature in 1947 provided for the establishment of The Texas State University for Negroes to be located at Houston, and for the immediate establishment of one of its branches, the School of Law, to be located at Austin until the university at Houston was ready to assume the responsibility. The statute reads:

> "It is the purpose of this Act to establish an entirely separate and equivalent university of the first class for Negroes with full rights to the use of tax money and the general revenue fund for establishment, maintenance, erection of buildings, and operation . . ."[2]

With an initial Legislative appropriation of over three million dollars,[3] a grant of 53 acres of land between Rice Institute and the University of Houston, and a grant of other assets of the Houston College for Negroes valued in excess of a million dollars, that University was established at Houston.[4]

[2] S. B. 140, 50th Leg. 1947. Set out at page 110 of Appendix, Respondents' Original Brief.

[3] *Ibid*, Point II.

[4] Report of State Auditor to Governor, Aug. 31, 1948, on Texas State University for Negroes. Appendix to Respondents' Original Brief, page 99. This transfer was made pursuant to H. B. 780, 50th Leg., 1947, being Art. 2643 (c) Tex. Civ. Stat. (Vernon 1948). It is discussed in the Record. (R. 54.)

The Act also provided:

> ". . . the Board of Regents of The University of Texas *is authorized and required to forthwith* organize and establish a separate School of Law at Austin for Negroes, to be known as the 'School of Law of The Texas State University for Negroes' and therein provide instruction in law equivalent to the same instruction being offered in law at The University of Texas. . . ."[5]

With an additional appropriation of $100,000.00 that Law School was established (R. 36, 43, 86).[6]

Petitioner stated on the trial that even if the Negro law school was the *absolute equivalent* of the Law School of The University of Texas, he would not attend it. (R. 188.) The trial court's judgment recites that:

> "From his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages . . ."[7]

On March 3, 1947, the Registrar wrote Petitioner that the School of Law would be open March 10, 1947, and that his application theretofore made (to The University of Texas) and his qualifications would entitle him to enter.[8]

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[5] Italics are added throughout this brief unless otherwise indicated.

[6] Before the school was established, Petitioner testified by deposition that he would attend a separate equal law school. (R. 179.) On the trial, he stated that he had changed his mind. (R. 182.)

[7] R. 440.

[8] R. 159, 372; Respondents' Exhibit 13.

The letter informed Petitioner that his instructors would be *the same professors* who were and are teaching at the School of Law of The University of Texas; that the courses, texts, collateral readings, standards of instruction, and standards of scholarship *would be identical* with those prevailing at the School of Law of The University of Texas; that a library was being installed, and that full use of the library of the Supreme Court of Texas was available prior to the delivery of a complete new library then on order; and that the new library would include all books required to meet the standards of the American Association of Law Schools and the American Bar Association.[9]

Although Petitioner received the letter, he did not answer it. Without coming to Austin to talk to the Dean, the Registrar, or any of his prospective professors (R. 186), and without making any personal investigation of the school, the courses, faculty, or physical plant, he decided not to attend.[10] The school was nevertheless ready to receive and instruct him.[11]

After hearing the evidence, the trial court found in its judgment:

> ". . . this Court finds . . . that . . . the Respondents herein, . . . have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors

[9] R. 372-374.
[10] R. 174, 175, 177, 186.
[11] R. 86.

as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas; that Realtor, although duly notified that he was eligible and would be admitted to said law school March 10, 1947, declined to register . . ."[12]

Petitioner appealed to the Texas Court of Civil Appeals but Petitioner did not invoke the jurisdiction of that Court as to the want or sufficiency of the evidence to support the findings of fact as to the equality of the separate schools.[13] That Court found in its opinion that "*Our jurisdiction in this latter regard was not invoked in this case. . . .* However . . . . were our jurisdiction in that regard properly invoked, we would be constrained to hold that its preponderance and overwhelming weight supports the trial court's judgment."[14] Nor was the jurisdiction of the Texas Supreme Court invoked to consider whether there was evidence to support the findings of fact and the judgment. In the absence of such point of error that Court had no jurisdiction to pass on the matter.[15]

So the fact issue of whether Petitioner was offered equal facilities, not having been presented to the ap-

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[12] R. 440.

[13] This is developed in Respondents' Point IV.

[14] R. 461. The opinion of the Texas Court of Civil Appeals is reported in 210 S. W. (2d) 442 (1948).

[15] The Texas Supreme Court refused Petitioners' application for a writ of error. Except on very rare occasions, that Court does not write an opinion on refusing a writ of error. None was written in this case.

pellate courts of Texas, is not properly before this Court.

But assuming the issue to be properly before this Court, there is ample evidence to support the trial court's findings of fact and judgment.

As will be shown in the Addendum to this brief, the Negro Law School, after the trial of this case, was moved to Houston to become a permanent part of Texas State University, as contemplated in the statute. With its fine library of over 24,000 volumes and its up-to-date facilities in the new buildings in which it is housed, it has been found to meet the standards of the American Bar Association and the American Association of Law Schools. It has been granted provisional approval by the American Bar Association. Its accreditation by the American Association of Law Schools is contingent upon the outcome of this suit.

The law question remaining, therefore, is whether the State, which is not obligated by the Federal Constitution to furnish education to anyone, may provide education for its white and Negro students in separate schools providing equal facilities for both.

First Point

Section 7 of Artice VII of the Texas Constitution and related statutes providing that the State shall furnish equal education to its Negro and white students in separate schools are constitutional. The power of the States to so classify and the reasonableness of this classification have been settled as a matter of law by this Court as not violative of

the equal protection clause of the Fourteenth Amendment.

Argument and Authorities

The decisions of this Court are uniform in their holding that states may, by Constitution or statute, provide separate establishments for the education of their Negro and white students, provided equal facilities and opportunities are made available to each group. Related to the education cases are transportation cases. They are cited for their holdings on the "equal protection clause."

United States Supreme Court Decisions

Petitioner and his supporting *amici curiae* would make it appear that *Plessy v. Ferguson* is the only decision of this Court in which the validity of the separation of the races, and the reasonableness of the classification as to race when equal facilities are furnished, has been considered. An examination of the cases will show that both of these related questions have been many times examined and re-examined. The fact that the principles were and are so well established that the Court believed it unnecessary to write extensively on them in each case is certainly not to be taken to mean that this Court did not carefully weight and consider its decision in each case.

The principal decisions of this Court on this point are presented in chronological order.

1. *Hall v. DeCuir*, 95 U. S. 485 (1877). A Louisiana statute provided for enforced commingling of

the races in common carriers. A steamboat master operating in interstate commerce, separated Negro and white passengers and was sued for damages for having denied a Negro woman the right to remain in cabins reserved for whites. A judgment against him resulted. In reversing the judgment, this Court held that the Louisiana statute was an interference with interstate commerce and that Congressional inaction left the ship's master free to adopt such reasonable rules as seemed best for all concerned. Said the Court:

> ". . . we think this [Louisana] statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisana in the same cabin with whites, is unconstitutional. . . ." 95 U. S. 490.

Mr. Justice Clifford concurring, went into the matter more fully, including the reasonableness of the classification:

> ". . . Substantial equality of right is the law of the State and of the United States; but equality does not mean identity, as in the nature of things identity in the accommodation afforded to passengers, whether colored or white, is impossible. . . . " 95 U. S. at 503.

Reviewing the authorities, he wrote:

> "Questions of a kindred character have arisen in several of the States, which support these views in a course of reasoning entirely satisfactory and conclusive. . . . . . equality of rights

does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that *any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution*, nor would it contravene the provisions of either. . . .

"Separate primary schools for colored and for white children were maintained in the city of Boston. . . . Distinguished counsel insisted that the separation tended to deepen and perpetuate the odious distinction of caste; but the court responded, that they were not able to say that the decision was not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment. . . .

"Age and sex have always been marks of classification in public schools throughout the history of our country, and the Supreme Court of Nevada well held that the trustees of the public schools in that State might send colored children to one school and white children to another. . . ."

". . . and it is settled law there that the (school) board may assign a particular school for colored children, and exclude them from schools assigned for white children, and that such a regulation is not in violation of the Fourteenth Amendment." 95 U. S. at 506.

2. *Plessy v. Ferguson*, 163 U.S. 537 (1896). A later Louisiana statute required that colored and white passengers be furnished separate accommodations on carriers. Plessy, a Negro, was convicted for

refusing to occupy the section set aside for his race. The railroad did not operate in interstate commerce. It was squarely contended by Plessy that the state law, as applied to him, violated the equal protection clause.[16] In overruling the contention, this Court said:

> "The object of the (14th) Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. *The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the*

[16] Among the questions presented in the brief for plaintiff in error (Plessy) was: "Has the State the power under the provisions of the Constitution of the United States to make a distinction based on color in the enjoyment of chartered privileges within the State?" (Page 5, his Brief.) The Court also had before it *Railway v. Brown*, 17 Wall 445 (1873). Based on a provision of a private charter granted by Congress in 1863 applicable only to one particular line in the District of Columbia, it was held that Negroes could not be excluded from its cars. Petitioner does not rely on the case, but it is cited in some of his *amici* briefs. The Court in the *Plessy* case considered the *Brown* case and expressly distinguished it as dealing with "laws of a particular locality." 163 U. S. at 545.

legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. . . .

"The distinction between laws interfering with the *political equality* of the Negro and *those requiring the separation of the two races in schools*, . . . and railway carriages *has been frequently drawn by this court*. . . .

"*So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation*, and with respect to this there must necessarily be a large discretion on the part of the Legislature. *In determining the question of reasonableness* it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures. . . .

". . . When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed."

Petitioner cites Mr. Justice Harlan's vigorous dissent in this case as an indication that he would have thought also that separate schools were violative of the Fourteenth Amendment. It is significant that in his long list of "inequalities" which he said the majority opinion would permit, Mr. Justice Harlan did not mention separation in public education. In view of the obvious omission of the school question from his dissent and his subsequent words in *Cumming v. Board of Education* and *Berea College v. Kentucky, infra*, it is difficult to understand how anyone could conclude that Mr. Justice Harlan believed separate but equal school systems to be unconstitutional.

3. *Cumming v. Board of Education*, 175 U.S. 528 (1899). An action was brought to restrain the Board from maintaining a high school for white children without maintaining one for Negro children. The Constitution of Georgia which stated that "separate schools shall be provided for the white and colored races" was before this Court and quoted in its opinion. The injunction was denied. It was held that the equitable relief sought was not a proper remedy. Mr. Justice Harlan, speaking for the Court, said:

> "Under the circumstances disclosed, we cannot say that this action of the State court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs, and to those associated with them of the equal protection of the laws, or of any privilege belonging to them as citizens of the United States. We may add that while all admit that the

> benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, *the education of the people in schools maintained by state taxation is a matter belonging to the respective States*, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

This language of Mr. Justice Harlan was quoted with approval by this Court in *Gong Lum v. Rice*, 275 U. S. 78 at 85, hereinafter discussed.

4. *Chesapeake & Ohio Ry. v. Kentucky*, 179 U.S. 388 (1900). A Kentucky statute required railways to furnish separate cars for white and Negro passengers. Upon being convicted for violations of the act, the railway appealed. After determining that the Kentucky act applied only to its domestic and not interstate commerce, this Court concluded, under the *DeCuir* and other cases, that "there can be no doubt as to its constitutionality."

To emphasize that this Court did consider and pass upon the separation of the races under the equal protection clause, the following is quoted from Mr. Justice Brown's opinion. It refers to the *Plessy* case:

> "On writ of error from this court, it was held that no question of interference with interstate commerce could possibly arise, . . . Indeed, the act was not claimed to be unconstitutional as an interference with interstate commerce, but *its invalidity was urged upon the ground* that it

abridged the privileges or immunities of citizens, deprived the petitioner of his property without due process of law, and also *denied him the equal protection of the laws. His contention was overruled, and the statute held to be no violation of the Fourteenth Amendment.*" 179 U. S. at 393.

5. *Berea College v. Kentucky*, 211 U. S. 45 (1908). A private college, a Kentucky corporation, was convicted of violation of a Kentucky statute which made it unlawful for a person or corporation to operate a school or college which received both white and Negro students. Wrote Mr. Justice Brewer:

> ". . . the single question for our consideration is whether it (the statute) conflicts with the Federal Constitution. . . . That the Legislature of Kentucky desired to separate the teaching of white and colored children may be conceded. . . ." 211 U. S. at 53, 55.

The statute was upheld. Corporations being creatures of the State, it could grant or withhold corporate powers.

The holding was that the State could, within the Fourteenth Amendment, prohibit the teaching of white and Negro students together in the same *private* school or college. It goes much further than the public schools.[17] The breadth of the holding is

[17] Mr. Justice Holmes, who is quoted at several places in Petitioner's brief, was a member of the concurring majority in this case as well as the *Chiles v. Chesapeake & Ohio*, *McCabe v. A. T. & S. F.*, and *Gong Lum v. Rice*, cases hereinafter discussed.

emphasized in the dissent by Mr. Justice Harlan, who points out that the title of the act read:

> "An Act to prohibit white and colored persons from attending the same school."

He further pointed out that the trial court overruled the objection that the statute violated the Fourteenth Amendment, and that the highest court of Kentucky held that it was entirely competent for the State to adopt the policy of the separation of the races. He wrote:

> "It is absolutely certain that the legislature had in mind to prohibit the teaching of the two races in the same *private* institution, at the same time by whomever that institution was conducted." 211 U.S. at 62.

Mr. Justice Harlan made it clear that his dissent was leveled only at the requirement for separation of the races at *private* institutions. As to the *public schools*, Mr. Justice Harlan said:

> *"Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense."* 211 U.S. at 69.

6. *Chiles v. Chesapeake & Ohio Ry.*, 28 U.S. 71 (1910). Chiles, a Negro traveling in interstate commerce, was required to move to a section set apart for Negroes. The Kentucky courts held that their statute requiring separation of the races was not applicable to interstate passengers. It denied relief on the basis of the regulations of the railway com-

pany requiring separation. The only questions before this Court concerned the validity and reasonableness of those regulations.

This Court first considered the commerce clause. *Hall v. DeCuir* was followed in its holding that in the absence of Congressional regulation of interstate commerce, carriers may make *reasonable* regulations for the safety and comfort of their passengers.

Regarding the reasonableness of the regulation, this Court turned to *Plessy v. Ferguson:*

> "The statute was attacked on the ground that it violated the Thirteenth and Fourteenth Amendments of the Constitution of the United States. The opinion of the court . . . reviewed prior cases, and not only sustained the law *but justified as reasonable the distinction between the races on account of which the statute was passed and enforced.* It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. *Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable.* See also *Chesapeake & Ohio Ry. Company v. Kentucky,* 179 U.S. 388."

The following paragraph clearly indicates that this Court did reconsider the constitutionality of separate

equal facilities and the classification of persons as to race. It also indicates that the Court, after consideration, was satisfied with the opinion of Mr. Justice Clifford in the *DeCuir* case and its decision in the *Plessy* case, and that further writing on the subject was simply unnecessary. The opinion reads:

> "The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers *has been discussed so much that we are relieved from further enlargement upon it.* We may refer to Mr. Justice Clifford's concurring opinion in *Hall v. DeCuir* for a review of the cases. They are also cited in *Plessy v. Ferguson* at page 550. We think the judgment should be affirmed."

7. *McCabe v. A. T. & S. F. Ry. Co.*, 235 U.S. 151 (1914). Action by Negro citizens to enjoin enforcement of an Oklahoma statute requiring separation of white and colored citizens on trains and in waiting rooms because (1) such statute violated the Fourteenth Amendment, and (2) the statute constituted a burden on interstate commerce.

With reference to the Fourteenth Amendment, this Court, speaking through Mr. Justice Hughes, expressly approved the holding of the Circuit Court:

> "That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th Amendment for a State to require separate, but equal, accommodations for the two races."

8. *Gong Lum v. Rice*, 275 U. S. 78 (1927) is a case directly in point. The Constitution of Mississippi, the pertinent portion of which is set out in this Court's opinion, read:

> "Separate schools shall be maintained for children of the white and colored races."

A Chinese girl, classified as "colored" under Mississippi law, was denied admission to the white school. A direct attack was made on the constitutionality of the separation of the races for schooling purposes, the contention being made that such was a violation of the equal protection clause of the Fourteenth Amendment. The first assignment of error in this Court was:

> "A child of school age and otherwise qualified . . . is denied the equal protection of the laws when she is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race." (Brief and Argument for Plaintiff in Error, p. 5.)[18]

Mr. Chief Justice Taft, speaking for a unanimous Court composed of himself and Justices Holmes, Van Devanter, Brandeis, Stone, McReynolds, Sutherland, Butler, and Sanford, clearly stated the question before the Court:

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[18] This point is stressed in these cases because of the assertion by Petitioner and his supporting *amici curiae* that this Court his never considered and passed on the question, or that if it did consider it in the *Plessy* case, it has not reconsidered it since then. The assertion is, of course, unfounded and reflects upon the opinions of this Court which plainly recite or clearly show that the matter was before the Court and decided upon.

> "The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry born in this country, and a citizen of the United States, equal protection of the laws by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races."

Showing that the Court was especially concerned with the constitutionality of separate schools under the equal protection clause, he stated more specifically:

> "The question here is whether a Chinese citizen of the United States *is denied equal protection of the laws* when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black." *Id.* at page 85.

Again having considered the matter (and having reconsidered the principles of the *Plessy* case) the Court found the previous decisions of *Cumming v. Board of Education* and the *Plessy* case sound. The opinion used Mr. Justice Harlan's words from the *Cumming* opinion:

> "We cannot say that this action . . . was, within the meaning of the Fourteenth Amendment, a denial . . . of the equal protection of the laws. . . . We may add that, while all admit that the benefits and burdens of public taxation must be shared . . . without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states . . ."

The opinion continued,

> "In *Plessy v. Ferguson* . . . in upholding the validity under the Fourteenth Amendment of a statute of Louisiana requiring the separation of the white and colored in railway coaches, a more difficult question than this, this Court, speaking of permitting race separation, said,
>
> " 'The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.' "

Finding it unnecessary to write further, the Chief Justice said for the Court,

> ". . . *we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts* under the Federal Constitution."

The Court concluded:

> "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. . . ."
>
> *"The decision is within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment.* The judgment of the Supreme Court of Mississippi is affirmed."

9. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). Gaines, a Negro, was refused admis-

sion to the School of Law of the University of Missouri. The question before this Court was stated at the beginning of the opinion:

> "Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment . . . petitioner brought this action for mandamus to compel . . . the University to admit him."

The first point raised in this Court in the Petition for Certiorari (p. 17) was:

> "The State of Missouri denied petitioner the equal protection of the laws in excluding him from the School of Law of the University of Missouri solely because he is a Negro."

Upon a finding that there was no school of law for Negroes, and that there was no mandatory duty upon any official to establish such a school, this Court held that "*in the absence of other and proper provisions for his legal training within the State*," Gaines would be entitled to enter the University of Missouri Law School.

Mr. Chief Justice Hughes, speaking for the majority composed of himself, two members of the present Court, Mr. Justice Black and Mr. Justice Reed, and Justices Brandeis, Stone, and Roberts, again announced the considered opinion of this Court on the principles applicable here:

> "In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully

recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded for white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, *a method the validity of which has been sustained by our decisions.*" (citing with approval the *Plessy*, *McCabe*, and *Gong Lum* decisions.)

". . . *The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State.*"

"Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the *State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race. . . .*"

"We are of the opinion . . . that petitioner was entitled to be admitted to the law school of the State University *in the absence of other and proper provision for his legal training within the State.*"[19]

The dissent in the case by Justices Butler and McReynolds was not from the announced principles of the validity of separate schools where there are

[19] The cause was remanded to the Missouri Supreme Court. Its subsequent decision, 344 Mo. 1238, 131 S. W. (2d) 217 (1939), recognizes that the Legislature had enacted a statute making it mandatory that equal educational opportunities be afforded colored students. It remanded the cause to the trial court for a finding on such equality by the opening of the next school year. No further proceedings occurred.

separate equal facilities within the State, but was on the proposition that Missouri already had complied with the Constitution by making a legal education available to petitioner in out-of-State schools.

The recent case of *Sipuel v. Board of Regents*, 332 U.S. 631 (1948), was a mandamus proceeding by a Negro to compel her admission to the University of Oklahoma law school.[20] The relief was denied by the State court principally on the ground that Sipuel had not made proper demand for the establishment of a separate law school. The brief *Per Curiam* holding of this Court was:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines v. Canada*. . . ."

In *Fisher v. Hurst*, 333 U.S. 147 (1948) the same petitioner, *nee* Sipuel, brought an original action in this Court to compel compliance with this Court's mandate in the *Sipuel* case. Following the *Sipuel*

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[20] The petition for certiorari did not present the issue of "whether a State might not satisfy the equal protection clause . . . by establishing a separate law school for Negroes" (*Fisher v. Hurst*, 333 U.S. 147, 150). Nevertheless, the Court's disposition of the case is significant in that it approved the same procedure as previous decisions in which the point was specifically raised and decided upon.

decision, the Oklahoma Supreme Court directed the Board of Regents of Oklahoma University:

> ". . . to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups . . . in conformity with the equal protection clause . . . and with the provisions of the Constitution and statutes of this State requiring segregation. . . ."

Pursuant thereto, the trial court ordered that unless the separate law school was established and ready to function at the designated time applicable to any other group, the Board of Regents must:

> "(1) enroll plaintiff . . . in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain . . . until such a separate law school for negroes is established. . . .
>
> "(2) not enroll any applicant of any group . . . until said separate school is established. . . .
>
> "It is further ordered . . . that if such a separate law school is so established . . . the defendants . . . are hereby ordered . . . to *not* enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma. . . ." 333 U.S. at 149.

In the original proceeding the question before this Court was whether its mandate in the *Sipuel* case had been followed. This Court concluded that:

> "It is clear that the District Court . . . *did not depart from our mandate.*"

This Court explained the *Sipuel* case:

> "The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she failed to demand establishment of a separate school. . . . On remand, the District Court correctly understood our decision to hold that the equal protection clause permits no such defense."

The *Sipuel* case, citing the *Gaines* case with approval, therefore took cognizance of the long established principle that separate schools may be provided so long as the facilities are equivalent.[21] It made clear that the opportunities must be provided for the Negro students as soon as they are made available to white students. In this case, the School of Law of the Texas State University was available to Petitioner at the time of this trial and is still available to him.

Other Federal and State Court Cases

In *Carr v. Corning* (C.C.A., D.C., decided February 15, 1950, unreported as yet), a mandatory injunction was sought to compel the admission of

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[21] Even Justice Rutledge in his dissent recognized that the separate but equal doctrine had been applied, although he disagreed with the manner of its application by the State Court. In explaining his interpretation of this Court's mandate in the *Sipuel* case he said:

> "It also meant that this should be done if not by excluding all students, then by affording petitioner the advantages of a legal education equal to those afforded to white students. And in my comprehension the equality required was equality in fact, not in legal fiction."

Negro students into the schools designated for white students in the District of Columbia. It was urged, as stated by the Court, that "the separation of the races is itself, apart from the equality or inequality of treatment, forbidden by the Constitution." "The question thus posed," continued the Court, "is whether the Constitution lifted this problem out of the hands of all the legislatures and settled it. We do not think it did." That Court, after reviewing the history of the Amendment and the Civil Rights Acts, said that the contemporaneous legislation by the Congress as to separate schools "conclusively supports our view of the amendment and its effects." It continued,

> "The Supreme Court has consistently held that if there be an 'equality of the privileges which the laws give to the separated groups' the races may be separated. That is to say that constitutional invalidity does not arise from the mere fact of separation but may arise from an inequality of treatment. Other courts have long held to the same effect."

The Court, one judge dissenting, thereupon sustained the validity of the separate schools in the District of Columbia.

Many of the strongest cases upholding the constitutionality of separation of the races have come from the highest courts of states outside the South. These cases, together with the many cases decided in the Southern States are set out in the Appendix beginning on page 211. They form a great body of the law on which thousands of schools and the struc-

ture of other important State functions of many States have been built. They are an important body of cases. They are placed in the Appendix in the interest of brevity. Two of the cases decided out of the South are here set out as illustrative.

In *People v. School Board of Queens*, 161 N. Y. 598, 56 N. E. 81 (1900), the only question was "whether the borough of Queens is authorized to maintain separate schools for the education of colored children." In upholding such action, the highest New York Court declared:

> "The most that the constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated,—not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the constitution to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained. . . ."[22]

In *State ex rel. Weaver v. Board of Trustees of Ohio State U.*, 126 Ohio St. 290, 185 N. E. 19

[22] New York enacted a statute in 1900 which prohibits separation of the races in schools. 2 N. Y. Laws 1900, ch. 492, p. 1173. The enactment of such statute is fully within the power of the State, just as laws requiring separation. This statute does not change the holding of the Courts where the statutes permit or require separation.

(1933) Ohio State University had offered a home economics course in which female students operated a residence wherein they lived. The course included cooking, buying, etc. A Negro's application for this course was refused, and an equivalent course was offered. She sued to compel her admission. The Ohio Supreme Court wrote in denying the mandamus:

> " 'Any classification which preserves substantially equal school advantages is not prohibited by either the state or federal constitution, nor would it contravene the provisions of either.' . . . the respondents had full authority to prescribe regulations that will prove most beneficial to the university and state and will best conserve, promote, and secure the educational advantages of all races. The purely social relations of our citizens cannot be enforced by law; nor were they intended to be regulated by our own laws or by the state and Federal Constitutions. . . . 'When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' "

PETITIONER'S CASES DISTINGUISHED

None of the cases cited by Petitioner holds that a State may not constitutionally provide education for its white and Negro students at separate schools where equal education is furnished to both groups. The cases above cited, and those hereinafter mentioned, are uniformly to the contrary.

The cases cited by Petitioner are principally those involving complete exclusion of Negroes or discrimination (as distinguished from separation) against persons of the Negro or Oriental races in matters of civil and political rights, such as jury service, voting in primaries, acquiring and holding property, earning a living, obtaining confessions by duress, and the like. These cases are obviously distinguishable from situations where persons of the white and Negro races are offered, at the State's expense, equivalent opportunities for obtaining an education.

Pearson v. Murray

Maryland having no separate law school, a mandamus was granted admitting a Negro to the University of Maryland Law School. The opinion, however, recognized that where equal opportunities are offered, a State may offer education at separate institutions:

> "Equality of treatment does not require that privileges be provided members of the two races in the same place. The state may choose the method by which equality is maintained. 'In the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.'" 169 Md. 478, 182 Atl. 590 (1936.)

Civil and Political Rights Cases

There are several cases which hold that under the 14th Amendment state action that prevents Negroes from serving on juries, or systematically excludes them, is unconstitutional.

Strauder v. West Virginia, 100 U. S. 303, simply holds that where a Negro is convicted of murder upon an indictment by a grand jury upon which no Negro served or could serve, the conviction must be reversed. The case is one of complete exclusion and discrimination, and not one of separation with equivalent facilities. [23]

As will be seen in Part II of this Brief, Congress early interpreted the Fourteenth Amendment to include equal protection in jury service. In 1869, it repealed its laws for the District of Columbia which had made Negroes ineligible for Jury service. [24] And

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[23] One of this group of cases, *Franklin v. South Carolina*, was argued the same week (April 18), and handed down the same day (May 31, 1910) as *Chiles v. Chesapeake & Ohio Ry.* which upheld as reasonable a carrier's regulation separating the races, showing a clear distinction in the minds of the Court. 218 U. S. 71 and 161. Other cases involving jury service are *Carter v. Texas*, 177 U. S. 442 (1900) (grand jury); *Pierre v. Louisiana*, 306 U. S. 354 (1939) (grand jury); *Smith v. Texas*, 311 U. S. 128 (1940) (grand jury); *Hill v. Texas*, 316 U. S. 400 (1942) (grand jury); *Patton v. Mississippi*, 332 U. S. 463 (1947) (grand jury); *Brunson v. North Carolina*, 333 U. S. 851 (1948) (grand jury). But cf. *Akins v. Texas*, 325 U. S. 398 (1945), and *Moore v. New York*, 333 U. S. 565 (1948).

[24] Act of March 18, 1869, 16 Stat. 3: ". . . the word 'white' wherever it occurs in the laws relating to the District of Columbia . . . and operates as a limitation on the right of any elector . . . to hold any office or to be selected and serve as a juror . . . is hereby repealed."

Section 4 of the Civil Rights Act of 1875 provided that no citizen should be disqualified for jury service on account of race. 18 Stat. 335. On the other hand, as will be discussed on pages 46 to 64, Congress maintained separate schools in the District of Columbia before, during, and after the adoption of the Fourteenth Amendment and specifically removed the reference to schools from various proposals including the 1875 Civil Rights Act in order to leave that matter to the States.

The *Strauder* case was considered at length in the *Plessy* case. Mr. Justice Strong, who wrote the *Strauder* case, was among the majority in the *Plessy* case and therefore agreed with that opinion which expressly distinguished the *Strauder* case, saying:

> "The distinction between laws interfering with the political equality of the Negro and those requiring the separation of the races in schools . . . and railroad carriages has been frequently drawn by this Court. Thus in *Strauder v. West Virginia* . . ." 163 U. S. at 545.

The *Strauder* case was also unsuccessfully urged on the Court in the *Gong Lum case*, 275 U. S. at 79, The distinction between exclusion from jury service in a case involving one's life, liberty, or property and cases involving the furnishing of equal education, at the expense of the State, to white and Negro students in different buildings, was clear to the Court.

To the same effect are cases involving voting rights.[25] The right to vote is a political right guaranteed by the Federal Constitution. These cases have nothing to do with offering of equal facilities in education.

There are several cases which have reversed criminal convictions of Negroes where it was shown that the convictions were based on confessions which were obtained under duress.[26] Obviously these duress cases apply to white as well Negro citizens. The obtaining of a confession by whipping and burning, whether applied to Negro or white, has nothing to do with the offering of equivalent facilities for education.

The Chinese and Japanese Exclusion Cases

A short summary of the facts of these cases will show their distinction.

Yick Wo v. Hopkins, 118 U. S. 356 (1886). A broad city ordinance gave a board unbridled power. The board arbitrarily refused to license 200 Chinese

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[25] *Nixon v. Herndon*, 273 U. S. 536 (1927); *Nixon v. Condon*, 286 U. S. 73 (1932); *Lane v. Wilson*, 307 U. S. 268 (1939); *U. S. v. Classic*, 313 U. S. 299 (1941); *Smith v. Allwright*, 321 U. S. 649 (1944) overruling *Grovey v. Townsend*, 295 U. S. 45; *Chapman v. King* (C.C.A. 5th, 1946), 154 F. (2d) 460, cert. den. 327 U. S. 800; and *Rice v. Elmore* (C.C.A. 4th, 1947), 165 F. (2d) 387, cert. den. 333 U. S. 875 (1948).

[26] *Brown v. Mississippi*, 297 U. S. 278 (1936); *Chambers v. Florida*, 309 U. S. 227 (1940); *White v. Texas*, 309 U. S. 631, 310 U. S. 530 (1940); *Ward v. Texas*, 316 U. S. 547 (1942); and *Lee v. Mississippi*, 332 U. S. 742 (1948). But cf. *Lyons v. Oklahoma*, 322 U. S. 596 (1944).

laundrymen and licensed 80 non-Chinese similarly situated. It was held that the equal protection clause applied to aliens, and that these Chinese were not afforded equal protection. They were not given equal opportunity but were completely deprived of the right to work and earn a living.

Truax v. Raich, 239 U. S. 33 (1915). An Arizona statute required employers to employ at least 80% qualified electors or citizens. Raich, an alien cook, was about to be fired simply because he was not a citizen. As in the *Yick Wo* case, it was held that the statute did not give Raich equal protection of the laws. The Court said that the Legislature does not have the power "to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood . . . *the right to work . . . is the very essence of personal freedom and opportunity that it was the purpose of the 14th Amendment to secure.*"

Takashashi v. Fish and Game Comm., 334 U. S. 410 (1948), falls under the above ruling. There the California statute kept an alien Japanese from fishing. It was the *right to work* which was protected.

Also among these "right to work" cases are *Steele v. L. & N. Ry.*, 323 U. S. 192 (1944), and *Tunstall v. Brotherhood*, 323 U. S. 210 (1944). The Court held that where Congress made a union the exclusive bargaining agency for railroad employees, that union must represent the Negro as well as white workers and not deprive the Negroes of the opportu-

nity to obtain the better jobs simply because of race, citing the *Yick Wo* case. The union must represent both groups equally. Underscoring the distinction in the types of cases, the *Gaines* case was cited with approval. 323 U. S. at 203.

These cases hold that a person may not be deprived of earning a living and kept from working at his trade simply because of race. They are clearly distinguishable. Texas is not denying education to any race. It is offering equal educational opportunities to white and Negro students at separate institutions.

Hirabayashi v. U. S., 320 U. S. 81 (1943) and *Koremtasu v. U. S.*, 323 U. S. 214 (1944), held that citizen Japanese could be made to respect curfew regulations and vacate war zones on the West Coast as a war measure. But in *Ex Parte Endo*, 323 U. S. 283 (1944), where a U. S. citizen of Japanese extraction, whose loyalty was not questioned, was moved out of her home and sent to a "relocation center," and had been awarded a "leave" to go by the civilian authorities in charge—and was yet arbitrarily detained, it was held that such citizen was entitled to *habeas corpus* to be released. The case on its facts is obviously distinguishable.

The Property Ownership Cases

The next group of cases held that the equal protection clause protects the rights to own and occupy land. It protects the person in that property right.

Thus in *Oyama v. California*, 332 U. S. 633 (1948), it was held that land owned in the name of

a U. S. citizen of Japanese extraction could not be escheated simply because it had been purchased for him by an alien Japanese in an alleged violation of the Alien Land Law of California. The citizen of Japenese ancestry was saddled with more onerous burdens in his *property* ownership than other citizens.

Similarly in *Shelley v. Kraemer*, 334 U. S. 1 (1948), the Court held in voiding state enforcement of restrctive covenants on realty that the equal protection clause protected the Negro against state action in his *right to own and occupy property.* The Court stated:

> "We have noted that freedom from discrimination by the States *in the enjoyment of property rights* was among the basic objectives . . . of the Fourteenth Amendment." 334 U. S. at 20.

Referring to the *Oyama* case, the Court said:

> "Only recently this Court had occasion to declare that a state law which denied *equal enjoyment of property rights* . . : was not a legitimate exercise of the state's police power. . . ."

The Court continued:

> ". . . it would appear beyond question that the power of the State to create and enforce *property interests* must be exercised within the boundaries defined by the Fourteenth Amendment." 334 U. S. at 22.

As will be discussed in Point II of this brief, the right to "purchase, lease, sell, hold, and convey real

and personal property, and to full and equal benefit of all laws and proceedings for the securing . . . of property" was enacted into the Civil Rights Act of 1866. 14 Stat. 27. The first section of the Fourteenth Amendment was generally understood to have embodied the 1866 Act. As stated by Flack, ". . . there seems to be little . . . difference between the interpretation put upon the first section by the majority and by the minorty, for nearly all said that it was but an incorporation of the Civil Rights Bill." *The Adoption of the Fourteenth Amendment*, p. 81.

On the other hand, the 1866 Act was amended to delete the general language which might have been construed to require mixed schools. Mr. Sumner's Civil Rights Bill was amended and passed by the Senate in 1872 after deleting reference to schools. The references to schools were deleted from the Civil Rights Act of 1875 to leave the matter to the States. The Congress, before, during, and after the adoption of the amendment operated separate schools in the District. All of this is discussed at length in Point II hereof.

Furthermore, this Court has heretofore distinguished between *property rights* and *privileges*, and between rights of "citizens of the United States" and privileges of "citizens of a State." Under the foregoing, the right of acquiring and holding realty is a *property right* of a *citizen of the United States*. But the receiving of an education, at the expense of the State, especially at the collegiate and professional level, is not a property right. *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934); *Waugh v. Mississippi*, 237 U. S. 589

(1915). It is referred to in the *Hamilton* case as a privilege given by the State.[27]

The distinction between the denial of the right to own and occupy property and the furnishing of equal facilities was drawn by this Court in *Buchanan v. Warley*, 245 U. S. 60 (1917). There a white citizen contracted to sell residential property in a white area to a Negro. A city ordinance prohibited the sale. The Negro attempted to avoid the sale claiming the validity of the ordinance. This Court held the ordinance void under the Fourteenth Amendment. The Negro insisted that the *Plessy* case was controlling. The Court, distinguishing between right to own property and the furnishing of equal facilities, said:

> "It will be observed that in that (*Plessy*) case, there was no attempt to deprive persons of color of transportation . . . and the express requirements were for equal though separate facilities. . . . In *Plessy v. Ferguson*, classification of accomodation was permitted upon the basis of equality for both races." 245 U. S. at 79.

The Interstate Commerce Cases

Morgan v. Virginia, 328 U. S. 373 (1946) held that a state statute requiring separation in inter-

[27] The 14th Amendment provides: "No state shall make or enforce any law which shall abridge the *privileges* or immunities of *citizens of the United States* . . ." The Court held that attending a state college is not a privilege of a *citizen of the United States* but is a privilege extended by one of the States of the United States, thus again distinguishing the two types of citizenship. *Slaughter House Cases*, 16 Wall. 36.

state carriers was invalid as a burden on interstate commerce. The shifting of passengers upon crossing state lines at night or in the daytime was an undue burden. The case is rooted in the *DeCuir* case. In the *DeCuir* case, the statute required commingling of the races. The *Morgan* case required separation of the races. Both were struck down. This Court based its decision in the *Morgan* case squarely on the interstate commerce clause. The Fourteenth Amendment and the cases construing it were not mentioned.

Regarding the interstate commerce clause, Mr. Justice Burton dissented, saying in part:

> "It is a fundamental concept of our Constitution that where conditions are diverse the solution of problems arising out of them may well come through the application of diversified treatment matching the diversified needs as determined by our local governments. Uniformity of treatment is appropriate where a substantial uniformity of conditions exists."

Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28 (1948), was also decided wholly under the interstate commerce clause. A steamship operated to and from an island just off shore but across the Canadian line. It refused passage to a Negro. It was held that the application of the Michigan Civil Rights Act to the facts was not a burden on interstate commerce, it being a completely localized transaction.

The case is further distinguishable because, as pointed out by Mr. Justice Rutledge in the majority opinion and by Mr. Justice Douglas concurring, the

carrier did not offer equal facilities; it completely excluded the Negro from passage on the ship. Mr. Justice Douglas continued, citing the *Gaines* case:

> "Nothing short of at least 'equality of legal right' *(Missouri ex rel. Gaines v. Canada . . .)* in obtaining transportation can satisfy the Equal Protection Clause." 333 U. S. at 42.

On the other hand, where no interstate commerce is involved, state statutes requiring separation with equal facilities have been held not to violate the equal protection clause. *Plessy v. Ferguson, supra; Chesapeake & O. Ry. v. Kentucky, supra.* Where no state action is involved, similar regulations of private carriers have been upheld as reasonable. *Chiles v. Chesapeake & O. Ry., supra.*

Argument

The foregoing cases argue themselves. They demonstrate that this Court has uniformly held that the states may furnish education to their white and Negro citizens at separate institutions so long as substantially equal facilities are offered both groups. Petitioner has cited no case to the contrary.

As this Court said in the *Gong Lum* case:

> "The right and power of the State to regulate the method of providing for the education of its youth at public expense is clear. . . . The decision (to separate the races) is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment." 275 U. S. at 85 and 87.

In the *Gaines* case Mr. Justice Hughes speaking for the Court, recognized the long-established rule. He wrote: "The state has sought to fulfill that obligation by furnishing equal facilities in separate schools, *a method the validity of which has been sustained by our decisions.*"

The *Sipuel* case, citing the *Gaines* case with approval took cognizance of the long established principles announced therein. And the opinion in *Fisher v. Hurst*, that the subsequent judgments of the Oklahome courts were not inconsistent with its *Sipuel* mandate, is in harmony with the holdings of the *Gong Lum*, *Plessy*, *Gaines* and other cases herein set out.

It is therefore respectfully submitted that Article VII, Section 7 of the Texas Constitution and related statutes providing that the State shall furnish equal education to its Negro and white students in separate schools are Constitutional.

Second Point

The background and contemporaneous construction of the Fourteenth Amendment sustain this Court's interpretation that under the Amendment the States may furnish equal education to their Negro and white students in separate schools.

Argument and Authorities

Under Point I the State has called attention to nine decisions of this Court, thirteen Federal Court deci-

sions and fifty-eight State Court decisions which interpret the equal protection clause of the Fourteenth Amendment as not prohibiting States from furnishing equal educational advantages to Negro and white students in separate schools.

Petitioner asks that this Court's decisions be re-examined and overruled. He charges that the distinguished members of this Court for the past sixty years have misinterpreted the Fourteenth Amendment. He says that a restudy of its purposes, background and contemporaneous construction is justified in order to place a new and different interpretation thereon in so far as it applies to this case.

We believe that the question has been well settled by this Court, and its decisions so long relied upon by the States and the Congress in the establishment and maintenance of public educational facilities, that re-examination of the cases is unjustified.

It should be enough that such distinguished jurists as Hughes and Holmes concluded

> "That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th Amendment for a State to require separate, but equal, accommodations for the two races."[28]

or that such Justices as Taft, Holmes, Brandeis, and Stone concluded

> "that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle

[28] *McCabe v. A. T. & S. F. Ry Co.*, 235 U.S. 151 (1914).

without intervention of the federal courts under the Federal Constitution."[29]

or that Justices Hughes, Brandeis, Stone, Black and Reed found the separate equal educational system to be one

"the validity of which has been sustained by our decisions."[30]

However, Respondents have nothing to fear if this Court desires to re-examine its previous interpretations of the Fourteenth Amendment in the light of the background, purpose, and common understanding at the time of its adoption.

In fact, such an examination will but serve to answer conclusively Petitioner's attempt to impeach this Court's former decisions as unwarranted and unsound. It will reveal that this Court's predecessors were better grounded in the purpose, understanding, and intent of the Fourteenth Amendment than Petitioner would lead the unsuspecting to believe.

In his attempt to show a contrary understanding of the Amendment as applied to this case, Petitioner cites only the words of four Senators who argued in 1874-1875 in favor of a law prohibiting separate schools but lost in their attempt.[31] In none of these quotations is there an assertion that the Fourteenth Amendment itself prohibits separate schools. Even if there were, it would be most unusual to give effect to an interpretation of a small and unsuccessful

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[29] *Gong Lum v. Rice*, 275 U.S. 78 (1927).
[30] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).
[31] Petitioner's brief, 56-60.

minority of the contemporaneous proposers of the Amendment in disregard of the majority interpretation which was actually adopted by Congress, the States, and the Courts.

As stated by Mr. Justice Frankfurter:

> "After all, an amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption.' . . . For it was for public adoption that it was proposed. . . .
>
> "Any evidence of design or purpose not contemporaneously known could hardly have influenced those who ratified the amendment."[32]

A. Congressional Action Before, During, and After the Adoption of the Fourteenth Amendment Clearly Indicates That the Amendment Was Not Intended to Remove the Power of the States to Provide Separate Equal Facilities for White and Negro Students.

The Acts of Congress and pertinent portions of the debates on the development and contemporaneous construction of the Fourteenth Amendment are set out at length in the Appendix hereto beginning on p. 128. As will be briefly summarized here, a study of this material shows that it was at no time considered by the Congress or by the States that separate equal schools were prohibited by the Fourteenth Amend-

[32] *Adamson v. California*, 332 U.S. 46, 63 and 64.

ment. Congress itself maintained separate schools before, during, and after the adoption of the amendment. It established separate schools for Negroes in 1862 in the District of Columbia and continued them.

After the Civil War, it enacted the Civil Rights Bill of 1866 which gave certain specific rights to the Negro. That bill was specifically amended so as not to apply, *inter alia*, to separate schools. Because of the doubts concerning its constitutionality, and in order to perpetuate the rights which were granted, the Fourteenth Amendment was adopted. The 1866 Act is therefore important for its bearing on the meaning of the Amendment.

During the debates on the Amendment, Congress conveyed land for its separate Negro schools in the District and enacted other laws for such schools. Immediately after the adoption of the Fourteenth Amendment, Congress passed other laws regulating the separate school system of the District. Subsequent attempts by Senator Sumner *et al.* to abolish separate schools in the District were defeated. The Civil Rights Act of 1875 was specifically amended to exclude public schools from its provisions in order to leave the matter to the States. The Congressional interpretation that separate schools may be constitutionally maintained continues today.

It is true that there are speeches by some who ardently advocated the complete intermingling of the races; for example, as set out in Petitioner's brief, those of Senators Sumner, Frelinghuysen, and Boutwell of Massachusetts and some of the Reconstruction Republicans from the South, such as Senator

Pease of Mississippi."[33] But as stated by Mr. Justice Frankfurter,

> "Remarks of a particular proponent of the amendment, no matter how influential, are not to be deemed part of the amendment."[34]

What is most important is what the Congress and the States *did*, and what Congress (or a majority of it) intended as a body.

This background and contemporaneous construction with reference to the public schools is, we think, of extreme importance to an understanding of the real and intended meaning of the Amendment and those who enacted it. It is set out in the Appendix only in the interest of brevity. It will be here summarized.

In 1862, Congress enacted laws to provide schools for Negroes in the District of Columbia[35] under the direction of a "Board of Trustees for Colored Schools." The Statutes were amended in 1864 to require that a proportionate part of all school tax money should go to the Negro schools.[36]

In January, 1866, Senator Trumbull of Ohio introduced the First Supplemental Freedmen's Bureau Bill and the bill which became the Civil Rights Act of 1866.[37] The Freedmen's Bill, which never became

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[33] This gentleman removed from the State to Dakota shortly after the Reconstruction Period, where he was employed by the U. S. Land Office. *Biographical Directory of the American Congress* 1774-1927, p. 1395. He is referred to in Garner's *Reconstruction in Mississippi* as a "carpetbagger." p. 243.

[34] *Adamson v. California*, 332 U.S. 46, 64.

[35] Appendix p. 128. 12 Stat. 394, 407, and 537 (1862). This whole section of the brief is fully footnoted in the Ap-

law because of President Johnson's veto, dealt principally with the government of the South. It authorized the Bureau to procure school buildings, but nothing in the debates indicates any desire to force mixed schools. It had a section on civil rights for Negroes, not including any reference to schools.[38]

1. The Civil Rights Act of 1866

The Civil Rights Act of 1866 is particularly important because of the very large number of the members of Congress who intended and believed that its provisions became embodied in the first section of the Fourteenth Amendment.[39] The bill in section one defined who were citizens of the United States. As originally introduced, it followed with very broad language as to civil rights:

> ". . . there shall be no discrimination in the Civil Rights . . . among the inhabitants of any State . . . on account of race . . ."

It continued to provide that

> ". . . the inhabitants of every race . . . shall have the same rights to make and enforce

(Ftn. 35 Cont'd) pendix and in the interest of brevity, references will generally be to the Appendix only.

[36] 13 Stat. 187 (1864).

[37] Appendix p. 130. In their brief the Committee of Law Teachers state that the Civil Rights Act was introduced by Senator Wilson. The bill (S. No. 9) to which they refer was introduced and debated for several days but was superseded by Senator Turnbull's Bill (S. No. 61) which became the Civil Rights Act of 1866.

[38] Appendix p. 131.

[39] Appendix p. 133; 39th Cong., 1st Sess., p. 319. Congressional references in this section are to the *Congressional Globe* through 1873 and to the *Congressional Record* thereafter.

> contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishments, pains, and penalties, and none others, any law, statutes, ordinances, regulations, or customs to the contrary notwithstanding."[40]

The House floor leader for the bill, Rep. Wilson of Iowa, explained the broad language, first set out above, of his bill. He said:

> "By no means can they be construed . . . nor do they mean that . . . their children shall attend the same schools. These are not civil rights or immunities."[41]

But the House was not satisfied with the general language of the bill. Mr. Bingham, in addition to thinking the bill unconstitutional, thought the language too broad.[42] Mr. Wilson replied to Mr. Bingham, who was an attorney:

> "He knows, as every man knows, that this bill refers to rights which belong to men as citizens of the United States and none other; and when he talks of setting aside school laws . . . by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here."[43]

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[40] 39th Cong., 1st Sess., pp. 474, 1117.

[41] Appendix p. 134.

[42] Appendix p. 135; 39th Cong., 1st Sess., p. 1117. He moved to strike the general words. Appendix p. 135; 39th Cong., 1st Sess., p. 1271.

[43] Appendix p. 136; 39th Cong., 1st Sess., p. 1291.

Nevertheless, Mr. Wilson had the bill recommitted, and it was amended to take out the broad language quoted in the first paragraph above. In that form the bill was enacted and passed over the President's veto.[44] The rights sought to be protected were those specifically quoted in the second paragraph above.[45]

2. The Resolution Proposing the Fourteenth Amendment

Because of the doubts as to its constitutionality and in order to place the Act of 1866 beyond Congressional repeal, the Republicans desired to put it in the Constitution. The Fourteenth Amendment was therefore proposed. Most of the debates on the resolution are not available because it was discussed and formulated in the caucuses of the Republican party and in the deliberations of the "Joint (Congressional) Committee of Fifteen on Reconstruction."[46]

We do know that broader language as to civil rights was proposed but not adopted. For example:

> "All provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges on account of race, creed or color, shall be inoperative and void."[47]

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[44] Appendix p. 138.

[45] Mr. Justice Black in the appendix to his dissent in the *Adamson* case referred to that Act as one of "certain defined civil rights." 332 U.S. 46 at 99.

[46] Appendix pp. 139 to 151.

[47] Appendix p. 140; Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914), p. 215.

A reading of the Journal of the Committee of Fifteen fails to disclose any reference whatever to the regulation of public schools. There is no inference that the resolution proposed was intended to force mixed schools. The Journal's reports dealt largely with other reconstruction problems. Neither the majority nor minority report of the Committee to Congress contained any reference to schools or any inference that the resolution proposed to cover more than the rights embodied in the Act of 1866.

A great many members of both houses made speeches indicating that they intended to embody the guarantee of the 1866 Act into the Constitution. These included Representatives Thaddeus Stevens, Broomall, Thayer, and Boyer of Pennsylvania, Raymond of New York, Eldridge of Wisconsin, and Eliot of Massachusetts.[48] Mr. Rogers of New Jersey said that the amendment was no more than "an attempt to embody in the Constitution . . . that outrageous and miserable Civil Rights Bill."[49]

Debate in the Senate indicated that the understanding of some Senators was that section one incorporated the Civil Rights Bill into the Constitution; and those who gave it a broader interpretation thought it gave Congress the power to prohibit discriminatory legislation.[50] No Senator indicated that its effect would be to abolish separate schools.

3. Acts Relating to Separate Schools in the District

All the time Congress debated the resolution on the Fourteenth Amendment, it was operating separate

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[48] See Appendix p. 146 for these references.
[49] 39th Cong., 1st Sess., p. 2537.
[50] Appendix pp. 147 to 149.

schools for white and Negro children in the District.[51] Congress debated the Fourteenth Amendment between February and June, 1866. During that time, on May 21, 1866, Congress enacted a bill donating real estate in the District for the separate Negro schools.[52] Between April and July, 1866, Congress considered and enacted a bill changing the tax support for the separate Negro schools of the District. In 1867 Senator Sumner proposed to require that the Constitutions of the Southern States must provide for "a system of public education open to all, without distinction of race or color," before the State could seat its representatives in the Congress. His proposition was defeated.[53]

4. The Period Immediately Following the Adoption of the Fourteenth Amendment in 1868

The Fourteenth Amendment was declared adopted July 28, 1868.[54] A bill which had passed the Senate in July, 1868, was passed by the House on February 5, 1869, changing only the administration of the separate schools in the District. The bill transferred the duties of the Negro trustees of the Negro schools to the (white) trustees of the public schools. The bill, of course, left the schools separate. The Negroes were greatly disturbed, not because the schools were separate, but because they wanted Negro trus-

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[51] Appendix p. 151.

[52] 18 Stat. 348 (1866).

[53] Appendix p. 152; 40th Cong., 1st Sess., p. 170.

[54] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stanford Law Rev. 134 (1949).

tees for their separate schools. President Johnson vetoed the bill for that reason.[55]

Thus, almost immediately after the adoption of the Fourteenth Amendment, the Congress re-examined its laws relating to separate schools and merely proposed to change the administration of them by consolidating the duties of the school boards. This is convincing proof that the Congress which proposed the Amendment did not construe it to require the abolition of separate schools.

In May, 1870, the Civil Rights Bill of 1866 was re-enacted in Section 18 of "The Enforcement Act of 1870." It is significant that the 1866 Act was not changed; no new sections or provisions were added.

In 1871 a sustained attempt was made in Congress to require abolition of separate schools in the District. The bill was defeated and Congress adhered to separate schools. The debates on this indicate that the States and their representatives in the Congress clearly believed that the power to provide separate or mixed schools remained in the States. Senator Patterson of New Jersey said that the law of the Northern States was that the boards of education were free "to determine for themselves whether they would mix the whites and blacks or have separate schools."[56] He thought mixed schools would destroy the public school system and that it would cause a loss of public support for their schools because the whites would withdraw. Senator Thurman of Ohio said the common schools were having difficulty enough without saddling the system with

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[55] Appendix p. 153; 40th Cong., 3rd Sess., p. 1164.

[56] Appendix p. 154; 441st Cong., 3rd Sess., pp. 1053-4.

a compulsory mixing of the races. He thought the Government should not force sociological ideas on the people; that communities should be left to choose for themselves separate or mixed schools.

5. Mr. Sumner's Recognition in 1871 That Mixed Schools Were Not Required

In October, 1871, Mr. Sumner recognized and said that mixed public schools were not then required and that the Civil Rights Act needed amending in that regard. To a convention of Negroes he wrote,

> "The right to vote will have new security when your equal rights in . . . common schools is at last established. . . . *This defect has been apparent from the beginning;* and, for a long time I have striven to remove it."[57]

6. The Senate's Passage of Sumner's Civil Rights Bill in 1872 After Deleting References to Schools and Churches

Another attempt to enact a broad civil rights bill, including a provision for mixed schools, was made by Mr. Sumner in 1871-1872. An amnesty bill to remove disabilities imposed on Southerners by the third section of the Fourteenth Amendment was proposed. It needed a two-thirds majority to pass. In the Senate, Mr. Sumner moved to amend by adding his broad civil rights bill to the amnesty bill. The series of maneuvers and debates on this situation are set out in the appendix, pages 157 to 164. Sumner was successful in two preliminary skirmishes in

[57] Appendix p. 157, note 94.

getting his bill added as an amendment to the amnesty bill in the Senate. But the amnesty bill, after it was added, failed to pass the Senate. Finally the Sumner bill was considered separately; *and after the references to mixed schools and churches was deleted*, it was passed by the Senate.[58] His bill, even as amended, did not pass the House. During the debates, Senator Frelinghuysen, whom Petitioner quotes at length on page 60, proposed to amend the Sumner bill to exempt certain separate schools with a provision that:

> ". . . churches, schools, cemeteries . . . established exclusively for either the white or colored race, should not be taken from the control of those establishing them, *but should remain devoted to their use.*"[59]

And Mr. Sumner accepted the amendment.[60] If separate schools were unconstitutional, those previously established could not be excepted. But the Congress knew separate public schools had not been invalidated by the Fourteenth Amendment.

It is also noteworthy that during the debate, Senator Trumbull of Illinois, who had introduced into the 39th Congress (which proposed the Fourteenth Amendment) the Civil Rights Act of 1866 and the Freedmen's Bureau bill, said,

> "The right to go to school is not a civil right and never was . . . it is a privilege."[61]

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[58] Appendix p. 163.
[59] Appendix p. 159; 42nd Cong., 2nd Sess., pp. 435, 487.
[60] Appendix p. 159; 42nd Cong., 2nd Sess., p. 453.
[61] Appendix p. 161; 42nd Cong., 2nd Sess., p. 3189.

Senator Ferry of Connecticut said that in the Northern States and in the District students were separated by race and by sex and given equal advantages.[62] The general feeling of the majority was expressed by the Senator from Connecticut:

> ". . . in the community where I reside there is no objection to mixed schools . . . and if I were called upon to vote *there*, I should vote for them. It would be a useless expense to establish separate schools for the few colored people in that community. But I cannot judge other communities by that community. . . . I believe the Senator's bill relating to the District of Columbia, for instance, would utterly destroy the school system in this District. . . .
>
> "Take for instance the State of Ohio where I understand the law permits the districts to have mixed or separated schools . . . and I observe a decision of the Supreme Court of Ohio reported in yesterday's newspaper . . . It had (there) been the assertion . . . that compelling the separation of the races into different buildings was a violation of the 14th amendment, notwithstanding that both races . . . enjoyed the same or equal privileges . . . but that Court . . . of judges whose political opinions are like those of the majority of this body . . . 'sustained the constitutionality . . . of the common school laws . . . and held that the organization of separate schools for colored children is not in conflict with the provisions of the fourteenth amendment.' I believe that that decision is good law."

Again in 1872 Mr. Sumner attempted to pass a bill to require mixed schools in the District. Mr.

[62] Appendix p. 161; 42nd Cong., 2nd Sess., p. 3190.

Stockton of New Jersey said that what Mr. Sumner wanted was not equal rights but the forced intermingling of the races.[63] Senator Ferry of Connecticut thought the bill tyrannical and that a vote should be taken to see if the people of the District wanted separate or mixed schools.[64] Mr. Edmunds of Vermont put the matter squarely up to the Senate:

> "It is a matter of great importance that we should determine fairly and squarely whether in the District of Columbia, where we have the power, that we shall exercise it . . ."

The Congress did determine the matter, just as it had in the past: that separate schools were not required. The bill was defeated and Congress continued to maintain separate schools.

7. Action and Debates on the Civil Rights Act of 1875

Debates on the two bills (S. R. 1 and H. R. 796) extended from 1873 to 1875. During this period, Congress enacted further legislation regulating the separate schools for white and Negro children in the District. Its Acts provided among other things that:

> "Any white resident shall be privileged to place his or her child . . . at any one of the schools provided for . . . white children . . . and any colored resident shall have the same rights with respect to colored schools."

The bill finally adopted as the Civil Rights Act was H. R. 796. Mr. Sumner's bill, S. R. 1, passed

[63] Appendix p. 160; 42nd Cong., 2nd Sess., p. 2540.
[64] Appendix p. 161; 42nd Cong., 2nd Sess., pp. 3124, 3125.

the Senate but never passed the House. It was the House bill which the Senate ultimately adopted.

It is true that certain amendments were defeated in the Senate during its consideration of S. R. 1 which never became law. But the assertion on page 58 of Petitioner's brief that "the Senate of the 42nd Congress concluded that 'separate but equal' schools if established . . . were a violation of the Fourteenth Amendment" is incorrect. He cites no authority for the statement. What he probably refers to is a vote in the 43rd Congress which defeated a proposed amendment in the Senate to Mr. Sumner's bill (S. R. 1) to specifically except separate schools.[65]

It will be remembered that the Senate earlier (1872) had specifically amended Sumner's Civil Rights bill by deleting reference to schools and churches and had passed it in that form.[66] On this occasion Mr. Sumner was successful in defeating the amendment. But the Senate later adopted H. R. 796 from which the reference to schools was omitted to leave the matter to the States.[67]

The opinions of some of the other Senators are enlightening to show the view which ultimately prevailed in the Senate. Senator Stockton of New Jersey said the regulation of the schools was a matter of State concern. The New Jersey Legislature, he said, would not pass a compulsory mixed school law: "They know their constituents do not desire it. They know it is not right." The Negroes, he said, are entitled to "equal" rights; but equal rights do not mean "the same" facilities.

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[65] 43rd Cong., 1st Sess., p. 4167.
[66] See p. 55, *supra*.
[67] 43rd Cong., 2nd Sess., pp. 997, 1010, 1870.

Senator Alcorn, a Republican of Mississippi, said that the Negroes were in control of his State; and so "self protection, if I had no higher motive would move me to support . . . this bill." But as to mixed schools he said:

> "You say that you do not want the schools mixed. Well, I am not in favor of mixing them; and I consider that this bill does not mix them. . . . How is it in my State? There . . . the colored people control; they make the laws; they levy the taxes; they appoint the school board. The whole machinery is in their hands; yet there is not a mixed school in the State . . . and we have civil rights there. Why is it? Simply because the colored people do not desire it; because they believe the interests of both races will be promoted by keeping the schools separate."

And Senator Saulsbury of Delaware, who had been in the 39th Congress, said that the Fourteenth Amendment did not remove the States' police power to have separate schools. Other speeches of this nature are set out in the Appendix.

8. Action on H. R. 796 Which Became the Civil Rights Act of 1875

It was the House Bill, from which the reference to schools was intentionally deleted to leave the matters to the States, which was finally passed by both Houses and became the Civil Rights Act of 1875. The development of the House Bill is most informative. Introduced by General Butler in 1873, it contained broad language, including language which might

have been construed to require mixed schools.[68] The opposition to the mixed school provision was so strong that Butler himself moved to recommit the bill to committee. He said:

> "But there are reasons why I think this question of mixed schools should be carefully considered. The Negroes . . . have never, until the last few years, had an opportunity for education. . . . Therefore in the Negro schools which I established as a military commander during the war, I found that while I had plenty of school boys with 'shining morning faces,' there were none 'creeping unwillingly to school.' . . . *And I shall recommit the bill . . . because I want time to consider whether upon the whole it is just to the negro children to put them into mixed schools.* . . .
>
> "And therefore I am quite content to consider this question in the light of what on the whole is best for the white and colored child before this matter is again before the House."[69]

Mr. Butler, who had been in the 39th Congress which proposed the Fourteenth Amendment, did not construe that amendment to require mixed schools. Otherwise he would not have been willing to consider the expediency of the separate school amendment.

The bill was recommitted and came out of committee specifically amended to allow separate schools. That portion of the bill, as it was debated in the House in February, 1875, contained the original words which were construed by some as prohibiting separate schools. It also contained the Judiciary Committee amendment:

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[68] Appendix p. 167; 43rd Cong., 1st Sess., p. 378.
[69] Appendix p. 172; 43rd Cong., 1st Sess., pp. 455-457.

> "Provided, That if any State or the proper authorities in any State, having the control of common schools or other public institutions of learning aforesaid, shall establish and maintain separate schools and institutions, giving equal educational advantages in all respects for different classes of persons entitled to attend such schools and institutions, such schools and institutions shall be a sufficient compliance with the provisions of this section so far as they relate to schools and institutions of learning."

Three principal amendments were offered from the floor. Mr. *Cessna* of Pennsylvania proposed to substitute the words of the (Sumner) Senate Bill.[70] Mr. *White* of Alabama proposed to allow separation of the races at inns, theaters, schools, and public conveyances.[71] Mr. *Kellogg* of Connecticut moved to strike the words of the original bill as to schools and also the proviso added by the House Judiciary Committee; i. e., to delete all reference to schools.

Mr. Kellogg explained his amendment to the House before the vote:

> "The amendment I have proposed is to strike out of the House bill reported by the Committee on the Judiciary all that part which relates to schools; and I do it, Mr. Speaker, in the interest of education, and especially in the interest of education of the colored children of the Southern States. . . . The proviso to the first section is one that makes a discrimination as to classes of persons attending public schools; and I do not wish to make any such provision in an act of Congress.

[70] Appendix p. 181; 43rd Cong., 2nd Sess., p. 1011.
[71] Appendix p. 181; 43rd Cong., 2nd Sess., p. 939.

"But upon this school question we should be careful that we do not inflict upon the several States of the Union an injury that we ought to avoid. A school system in most of the Southern States has been established since the war of the rebellion, by which the colored children of the South have the advantages of an education that they never could have before that time. I believe, from all the information I can obtain, that you will destroy the schools in many of the Southern States if you insist upon this provision of the bill. You will destroy the work of the past ten years and leave them to the mercy of the unfriendly legislation of the States where the party opposed to this bill is in power. *And besides, this matter of schools is one of the subjects that must be recognized and controlled by State legislation.* The States establish schools, raise taxes for that purpose, and they are also aided by private benefactions; and they have a right to expend the money, so raised, in their own way. . . ."[72]

The *Kellogg* amendment was adopted and the bill passed the House.[73] The Senate passed the House bill as it had been amended,[74] and it became law March 1, 1875.[75]

9. The Present Acts of Congress Providing for and Recognizing Separate Schools

The interpretation by the Congress that the Constitution authorizes the maintenance of separate

[72] Appendix p. 184; 43rd Cong., 2nd Sess., p. 997.
[73] Appendix p. 185; 43rd Cong., 2nd Sess., pp. 1010, 1011.
[74] 43rd Cong., 2nd Sess., p. 1870.
[75] *Id.* at 2013. This Court declared section one of this bill invalid. *Civil Rights Cases*, 109 U.S. 3 (1883).

equal schools has continued to the present. It maintains separate schools in the District of Columbia.[76] It provides appropriations for land-grant colleges maintained on a separate basis, the Act specifically recognizing separate colleges for white and Negro students.[77] And it provides appropriations under the National School Lunch Act to be expended in separate schools for white and Negro students.[78]

B. The Legislatures of the States Contemporaneously Construed the Fourteenth Amendment as Leaving to Them the Power to Maintain Separate or Mixed Schools.

The Fourteenth Amendment was adopted for the people by the Legislatures of the States. The intention and understanding of these bodies is therefore important in interpreting the meaning of the Amendment. An examination of the contemporaneous Acts of the State Legislatures of the "loyal" States, which Acts are summarized in the appendix hereto beginning on page 194, will demonstrate the uniformity of the legislative construction that the Fourteenth Amendment did not lift this problem out of the hands of all the State legislatures and settle it. On the contrary, the Legislatures, which were represented in Congress at the time when the Amendment was adopted, continued to exercise their own sound discretion as to the wisdom of maintaining separate

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[76] D. C. Code, Sec. 31-1110 *et seq.* and 31-109.

[77] These acts are discussed at length, Appendix p. 187; 7 U.S.C. § 323. These colleges include Texas A. & M. (white) and Prairie View A. & M. College (Negro).

[78] Appendix p. 193; 60 Stat. 233 (1946); 42 U.S.C. § 1760(c).

equal schools for their white and Negro students or maintaining mixed schools for the races."[19]

For example, **Indiana**, which ratified the Amendment in 1867, enacted in 1869 a law authorizing school trustees to "organize the colored children into separate schools." **Kansas**, which adopted the Amendment in 1867, authorized the establishment of separate schools in 1868. The statute was continued in force and re-enacted in 1879. **New York**, which continued its separate schools until its legislative act of 1900, enacted legislation as to separate schools as late as 1894. **California**, adopting the Amendment in 1868, authorized in 1869 the establishment of separate schools for Negroes and Indians. **Missouri** wrote into its Constitution in 1875 a provision for "Separate free schools" for Negroes. **Maryland** appropriated money in 1870 for the support of separate schools. The **Kentucky** General Assembly authorized separate schools by statute in 1871 and 1872 and wrote the policy into its Constitution of 1891. **New Jersey** established an industrial school for Negroes in 1895 although in 1881 (15 years after it adopted the Amendment) it enacted a statute that no child should be excluded from any public school on account of color. **Massachusetts** had established a policy of providing mixed schools before the adoption of the Amendment. **West Virginia** established separate schools in 1865, adopted the Fourteenth Amendment in 1867, and enacted a statute in 1871 that "white and colored persons shall not be taught in the same school." **Delaware**, of course, continues to authorize separate schools by Constitution and statute.

[19] See Appendix p. 194, for references to all the acts of the States here listed.

The States above named were of the "loyal" States. To the list of Legislatures must be added those of the Confederate States which likewise construed the Fourteenth Amendment to authorize separate schools. Notwithstanding the fact that Negro and white students did not attend the same schools in those Southern States (a fact well known to the Congress), the representatives of these States were re-seated in the Congress after the adoption of the Fourteenth Amendment. That is understandable since Congress itself maintained separate schools in the District of Columbia. In other words, it was the understanding and meaning of the Congress which proposed the Fourteenth Amendment, and of State Legislatures which adopted the Fourteenth Amendment, that separate equal schools were constitutional under the Amendment.

C. The Contemporaneous Construction of the State and Other Federal Courts Supports This Court's Opinion as to the Meaning of the Fourteenth Amendment With Reference to Schools

The uniform construction of the Supreme Courts of the States and the Federal Courts during the period immediately following the adoption of the Fourteenth Amendment (and thereafter as well) was that the Fourteenth Amendment did not remove the power of the legislatures to provide separate or mixed schools. And where separate equal schools had been or were established, their establishment and maintenance was upheld. These early interpretations by Courts whose members had the opportunity

to observe the proposal and adoption of the Amendment, and who had the benefit of counsel who were able to argue first hand the meaning of the Amendment so recently adopted, are of considerable significance.

One of the earliest cases after the adoption of the Amendment in 1868 was decided by the Ohio Supreme Court in 1871.[80] That opinion considered at length the effect of the Amendment and concluded that the State's statute providing separate equal schools for white and Negro students was constitutional. In 1872 the New York court held that where the separate schools were equal, the separation did not violate the Fourteenth Amendment.[81]

In 1873 the Pennsylvania court upheld that State's statute providing for separate schools against the contention that it violated the Fourteenth Amendment.[82] The California Supreme Court, in 1874, rendered a similar opinion.[83] Also in 1874, the In-

[80] *State v. McCann*, 21 Ohio St. 198.

[81] *People ex rel. Dietz v. Easton*, 13 Abb. (N.Y.) Pr. (N.S.) 159 The New York Court had held in 1869 that the Civil Rights Act of 1866 did not invalidate the separate schools for Negro and white students in Buffalo, N. Y. It said, "It was no part of the Civil Rights bill to regulate or provide for the enjoyment of rights or privileges of the nature of those in controversy. . . It is clear that the right or privilege of attending a school provided for white children is not among those included in this section." *Dallas v. Fosdick*, 40 How. Prac. 249. The highest court of New York reaffirmed this interpretation of the Fourteenth Amendment as to schools in *People v. Gallagher*, 93 N. Y. 438 (1883) and in *People v. Borough of Queens*, 161 N. Y. 598, 56 N. E. 81 (1900).

[82] *Commonwealth v. Williamson*, 30 Legal Int. 406.

[83] *Ward v. Flood*, 48 Cal. 36.

diana Court, considering the effect of the Amendment on Indiana's separate schools, said:

> "In our opinion, the classification of scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class. . . . ."

The Indiana Court, even at that early date, went back to consider contemporaneous construction:

> "The action of Congress, at the same session at which the fourteenth amendment was proposed to the States, and at a session subsequent to the date of its ratification is worthy of consideration as evincing the concurrent and aftermatured conviction of that body that there was nothing whatever in the amendment which prevented Congress from separating the white and colored races, and placing them . . . in differefit schools. . . ."[84]

Other cases of a similar nature during that period are set out in the Appendix beginning on page 200.

Argument

In the light of the foregoing history and contemporaneous construction of the Fourteenth Amendment, the opinions of this Court on the meaning of the Fourteenth Amendment as applied to the public schools are eminently correct. The Congress did not intend in the Civil Rights Acts or in the proposal of

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[84] *Cory v. Carter*, 48 Ind. 327.

the Fourteenth Amendment to take from the States the power to decide for themselves whether it was best for the education of the children of the State that white and Negro students should be taught in the same classroom or in separate buildings with equal facilities for all. That Congress had such intention is clearly evidenced by the fact that all during that period (and even today) it maintained separate schools in the District of Columbia.

The same construction was placed on the Fourteenth Amendment by the Legislatures of the States which adopted the Amendment for the people of the United States. This is unquestionably shown by their contemporaneous legislation establishing or continuing to maintain separate or mixed schools for Negro and white students.

Furthermore, the State and Federal Courts, in the period immediately following the adoption of the Amendment, agreed that the Amendment meant that the States could constitutionally maintain separate schools where equal facilities were furnished to all groups.

All of the foregoing: the intended construction of Congress which proposed the Amendment, the understanding of the State Legislatures in adopting it, the construction of the State and Federal Courts, and the opinions of this Court set out in Section I of this brief, lead to the inescapable conclusion that it was and is the law of the land that States have the constitutional power to separate their white and Negro students for educational purposes where they furnish equal facilities and opportunities for both races. The opinions of this Court, which have correctly decided this proposition, should be followed in this case.

Third Point

The power of the States to classify and the reasonableness of the classification in this case have been determined by this Court. Based on those decisions, the trial Court properly refused to go behind the Texas Constitution and the Legislative Acts to determine the reasonableness of or necessity for such classification. The trial Court therefore properly excluded evidence thereon.

A. The classification has been determined by this Court to be reasonable. The trial Court therefore correctly limited the testimony to the fact question of the equality of the schools in question.

B. If this Court disagrees with its previous decisions, or deems it proper to make a new, independent determination of the reasonableness and necessity for the classification made by the people of Texas in their Constitution and by the Legislature, then there is ample evidence to support such determination.

C. If the Court goes behind its own decisions and the Constitution and Statutes of Texas on the question of reasonableness, and if it decides that it has not sufficient material from the record, the briefs, and its judicial knowledge to find any reasonableness in the classification made by Texas, the Southern States, and the Congress, then, and only in that event, Respondents are entitled on a new trial to fully develop that proposition.

Preliminary Statement

This Court in its opinions herein set out under Point I has considered and decided that the States have the power, in the furnishing of education, to separate their students, and that such a classification is not unreasonable.

The desirability and expediency of maintainting separate schools for white and Negro students or mixing them in the same classroom are matters for legislative determination.[55] The pedagogical arguments of sociologists and educators, which occupy much of Petitioner's brief, are properly to be addressed to those forming the policies of the State as to the manner in which it, at its own expense, will provide education. As this Court has properly held, such matters are for the States themselves to decide. When equal facilities are offered, the Federal Courts may intervene only if it can be said that, as a matter of law, the classification is so completely unreasonable as to be violative of the Federal Constitution. The Federal Courts, as said by Mr. Justice Jackson, should not be induced to "accept the role of a super board of education for every school district in the nation."[56]

A school district may separate its students by their height, by their names, by sex, et cetera. Such separation is not the exercise of its police power, at least as that term is ordinarily understood. It is but the

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[55] "We must remember that on this particular point we are interpreting a constitution and not enacting a statute." *Carr v. Corning*, U. S. Ct. of App., D. C., Feb. 14, 1950.

[56] *McCollum v. Board of Education*, 333 U.S. 203 at 237 (1948).

exercising of the inherent power of the State to manage its own schools. And so long as each is given substantially the same facilities and advantages, each is given "the equal protection of the laws."

It is that inherent power to operate its schools in the manner deemed best for all the students, *together* with the State's police power to preserve and maintain the public welfare, peace, safety, and happiness of the people, that is the basis for the provision in the Texas Constitution.

It is respectfully submitted that this Court should follow its former decisions.[87] But if it deems it proper to put aside those precedents and examine the question anew, it will find that there is today ample evidence to support the classification the people of Texas have written into their Constitution and supplemented by Legislative Acts. With that in view, the reasonableness of and the necessity for the exercise of the police power, ably developed in the *Amicus* brief of the Southern States, will be discussed.

A. The Classification Has Been Determined by This Court to be Reasonable. The Trial Court Therefore Properly Limited the Testimony to the Fact Issue of the Equality of the Schools in Question.

The decisions of this Court set out under Point I clearly demonstrate that this Court has carefully

[87] As stated by Mr. Justice Reed: "This Court cannot be too cautious in upsetting practices embedded into our society by many years of experience. A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population." *Id.*, note 1 at 256.

and repeatedly held that the States may separate their white and Negro students and provide equal education for them at separate schools. The holding is expressly made in some and is necessarily implicit in others that the classification of the students is not unreasonable. In the interest of brevity, only short quotations from a few of the cases will be set out as illustrative.

Mr. Justice Clifford's concurring opinion in the *DeCuir* case which was cited with approval in this Court's opinion in the *Chiles* case:

> ". . . equality of rights does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that *any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution*, nor would it contravene the provisions of either." 95 U.S. at 504.

Plessy v. Ferguson, 163 U.S. 537 at 550:

> "So far, then, as a conflict with the Fourteenth Amendment is concerned, *the case reduces itself to a question whether the statute of Louisiana is a reasonable regulation*, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of

their comfort, and the preservation of the public peace and good order."

In the *Chiles* case, this Court said that the *Plessy* case not only sustained the law,

> ". . . but justified as reasonable the distinction between the races on account of which the statute was passed and enforced."

This Court then concluded anew that:

> "Regulations which are induced by the general sentiments of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable.
>
> "The extent of the differences based upon the distinction between the white and colored races which may be observed in legislation or in the regulation of carriers has been so much discussed that we are relieved from further enlarging upon it." 217 U.S. 71 at 77.

Similarly in *Gong Lum v. Rice*, the matter was squarely before this Court. Mr. Chief Justice Taft stated the problem and the Court's answer thereto:

> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that afforded to all. . . ."
>
> "Were this a new question it would call for full argument and consideration, but we think it is the same question which has been many times decided to be within the constitutional power of the state legislature. . . ."

". . . The decision is within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment." 275 U. S. at 85 and 87.

The reasonableness of the classification was recognized by Mr. Chief Justice Hughes when he wrote in the *Gaines* case in 1938:

"The State has sought to fulfill the obliagtion by furnishing equal facilities in separate schools, a method *the validity of which has been sustained by our decisions.*" 305 U. S. at 344.

With these decisions before it and with the *Sipuel* case which cited with approval the *Gaines* case, it is submitted that the trial Court correctly refused to go behind the provision of the Texas Constitution requiring separate impartial schools for whites and Negroes, and correctly excluded testimony as to the necessity for and the reasonableness of the classification.[88] The question as understood by the trial Court,

[88] Respondents of course object to the use by Petitioner in his brief of evidence not introduced or which was introduced and stricken, *e. g.*, that of Dr. Thompson on pages 67-71 of Petitioner's brief. The observations of this Petitioner's witness (whose evidence was excluded) was reduced to writing and published in a magazine. What is substantially his excluded testimony and that of other of Petitioner's witnesses is then cited to the Court in another form. Thompson, *Separate But Not Equal, The Sweatt Case*, cited in his brief, pp. 22, 30, 36, and 52. That and some 54 other of Petitioner's texts, surveys, reports, et cetera, were not offered in evidence. Most of the material in the Appendix to Petitioner's Petition for Certiorari was not even offered in evidence. To answer such "evidence," Respondents have felt it necessary to include some material of the same character in their Reply.

and upon which basis the case was tried, was: "Were the facilities offered Petitioner at the time of trial substantially equal . . ." That was the question and the trial Court correctly limited the testimony thereto.

B. If the Court Disagrees With its Previous Decisions or Deems it Proper to Make an Independent Determination of the Reasonableness of and Necessity for the Classification Made by the People of Texas in the Constitution and by the Legislature, Then There Is Ample Evidence to Support Such Determination.

Respondents submit that the Court should follow its previous opinions which have decided that the furnishing of equal facilities at separate schools to white and Negro students does not violate the provisions of the Fourteenth Amendment. Stated differently, the Court has previously decided that this classification of students is a reasonable exercise of the powers of the State. Should the Court, however, decide to go behind its decisions and behind the Constitution and Statutes of Texas as to the reasonableness of the action and the necessity therefor, it will find today ample evidence to support such classification.[89]

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[89] By setting out these matters Respondents do not withdraw from their position that this question had been settled by the Court and that the trial court correctly excluded evidence as to what happened at other places and at different times, and that such evidence should not be considered here. But Petitioner has included so much material of this sort in his brief that it was considered necessary to reply thereto.

At the outset, the findings and enactments of the Congress and of the Legislatures of 17 states should be taken as some evidence that the classification is not without reason.[90] The Court is of course aware of the delicacy of one of the branches of the government saying to the Congress and the State Legislatures of 17 States, who have heard much of the same arguments, that their findings and enactments are completely without reasonable justification.

The Texas Legislature as late as February 28, 1950, enacted a statute providing for separation of the races in State parks.[91] The Legislature found in the preamble to that statute that:

> "Whereas the necessity for such separation still exists in the interest of public welfare, safety, harmony, health, and recreation . . ."

and the emergency clause in the bill recites that:

> "The fact that the policy of the State in requiring separate park facilities for white and Negro citizens is necessary to preserve the public peace and welfare, and to protect the privi-

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[90] The *amicus* argument of the Attorneys General of the Southern States ably presents the views of that section of the United States.

[91] S. B. 19, 51st Leg., 1st Call. Sess. 1950, is set out in the Appendix at page 234. The bill passed the Senate with 29 yeas and no nays, was amended and passed by the House, 88 to 20. The Senate on February 28, 1950, agreed to the House Amendments, 27 to 0. It was signed by the Governor on March 14, 1950. Showing the extent of the necessity for the separation, the bill authorizes the closing of any facilities where separate equal accommodations cannot be furnished, the facilities to be reopened when the equal facilities are available.

leges of both white and Negro citizens in the use of the State parks . . ."

Regardless of how one would vote in a Legislative hall on the question of mixed or separate schools, it is submitted that those Legislators, educators, and other persons who hold that the furnishing of equal facilities at separate schools is best for both races and is necessary to preserve the public peace and welfare, are not completely without reason. For in order for Petitioner to prevail, it must be decided as a matter of law, that those who feel that mixed schools for the races in the South should not be required have no reasonable support whatsoever for their convictions.

In addition to the consideration by the Legislatures, many fair-minded citizens, both Negro and white, North and South, have considered the problem, its reasonableness, and its solution. Some of their findings and opinions, which Respondents say demonstrate the reasonableness of the classification, are here briefly set out.

1. The U. S. Department of Education's National Survey of Higher Education of Negroes

This series of United States government publications[92] was prepared by Dr. Ambrose Caliver, (R. 268) a Negro who was Senior Specialist on Negro Education in the U. S .Office of Education from 1930 to 1945, a specialist in higher education of

[92] Respondents' Original Exhibit 15, particularly pp. 77-91, Misc. No. 6, Vol. II.

Negroes since 1945, and a member of the N.A.A.C.P.[93] That survey concluded that:

> "Equality of educational opportunity for white persons and for Negroes at the level of higher education can be achieved, in theory, by either of two methods: (1) By admitting both white persons and Negroes to the same institution, or (2) by establishing parallel and equal facilities for members of the two races. In several of the States which maintain a dual educational system, however, neither of these methods is actually feasible. In some of the States the *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions. . . ." Misc. No. 6, Vol. II, p. 17.

Dr. Caliver then showed what a large proportion of the Northern Negroes voluntarily came South to attend separate Negro colleges:

> "The erroneous assumption that northern universities are carrying an unduly large responsibility for the higher education of Negroes may be accounted for, in part at least, by two common misconceptions. In the first place, the size of the northern Negro population is generally underestimated and, in the second place, it is not always known that large numbers of northern Negroes go South to attend Negro colleges." Id. at 82.
>
> "Whereas very few southern Negroes were attending these eight northern universities in 1939-40, in the year preceding nearly 4,000

[93] *Who's Who in America* 1950-51, page 409.

northern Negroes attended [separate] Negro colleges. Almost 3,000 of this number attended colleges in Southern States. The majority of these Negro students were residents of eight Northern States which rank high in economic resources. Thus instead of the Northern States carrying an undue burden in the higher education of Negroes, it appears that the Southern States, which have the least wealth, are providing educational facilities for Negro residents from economically more favored regions." (Id. at 90.)

He continued, giving reasons why the Negroes themselves preferred to go to a separate college:

"It is not possible, of course, to know how much of this southward migration is due to conditions within the northern institutions which make the Negro student feel that he does not secure a well-rounded college life in a mixed university, and how much is due to the positive advantages he feels are offered him in the Negro college.

"Some of the graduate students replying to the questionnaires were northern residents who had gone South to take their undergraduate work in Negro colleges. . . . *Some students said frankly that the Negro college offered a more normal social life.*" (Id. at 89.)

". . . the lack of opportunity for full participation in campus activities in the North adds attraction to the opportunities for leadership in such activities on a southern Negro college campus."

"A common reason given for the choice of the Negro college was the desire for a more normal

social life. The Negroes in northern institutions seldom live on the campus and seldom participate in the social activities of the University. Outside of college the Negro's social life is largely limited to association with his own people. Although southern Negro colleges operate in an area in which the total life of Negroes is restricted, the college campus itself is a small world in which the Negro student is relatively secure and in which he can achieve status among his own people." (Id. at 90.)

To the same effect is an article in the *Atlantic Monthly*, "The Negro and His Schooling," by Virginius Dabney:[94]

"Would a handful of Negro students registered at a Southern university for whites be apt to find themselves in congenial surroundings? It seems highly doubtful. They probably would suffer no violence, but they would almost certainly be happier at an all-Negro institution providing work of equal excellence. Evidence of this is seen in the fact that 42 per cent of the student body at Fisk University, Nashville, comes from the North, and evidently prefers the homogeneity of the Fisk all-Negro student body to the mixed student bodies available to them in their home states. Moreover, about one fourth of these Northern Negroes remain in the South after graduation."

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[94] Editor, Richmond Times-Dispatch; Author, "Liberalism in the South," B.A. and M.A., University of Virginia; Litt.D., University of Richmond; LL.D., William and Mary, (*Who's Who in America*, 1948-49, page 575.) The article appeared in the April 1942 issue.

2. Recommendations of the President's Commission on Higher Education

A minority of highly respected men whose views are certainly entitled to consideration on the question of whether or not the classification in question is wholly unreasonable filed a minority report to the President. These men were: Dr. Arthur H. Compton, Chancellor, Washington University, St. Louis; Douglas S. Freeman, Editor, Richmond Times-Dispatch; Lewis Jones, President, University of Arkansas; and Goodrich C. White, President, Emory University.

Their report read in part:

> "The undersigned wish to record their dissent from the Commission's pronouncements on segregation especially as related to education in the South. . . . We believe that efforts toward these ends must, in the South, be made within the established patterns of social relationships, which require separate educational institutions for whites and Negroes. We believe that pronouncements such as those of the Commission on the question of segregation jeopardize these efforts, impede progress, and threaten tragedy to the people of the South, both white and Negro. . . . But a doctrinaire position which ignores the facts of history and the realities of the present is not one that will contribute constructively to the solution of difficult problems of human relationships."[85]

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[85] *Higher Education for American Democracy* (1947), Vol. II, p. 29.

3. The President's Committee on Civil Rights

This group of nationally known responsible citizens, all of whom the President must have considered to be reasonable persons, was divided on the question of education. The majority of the Committee recommended that *the State legislatures* enact "fair educational practice laws," with boards and bureaus for enforcement purposes."[66] As to separation of the races, however, the feeling of some of these highly respected persons is recorded as follows:

> "A minority of the committee favors the elimination of segregation as an ultimate goal but . . . opposes the imposition of a federal sanction. It believes that federal aid to states for education . . . should be granted provided that the states do not discriminate in the distribution of the funds. It dissents, however, from the majority's recommendation that the abolition of segregation be made a requirement, until the people of the states involved have themselves abolished the provisions in their state constitutions and laws which now require segregation. Some members are against the nonsegregation requirement in educational grants on the ground that it represents federal control over education. They feel, moreover, that the best way to ultimately end segregation is to raise the educational level of the people in the states affected; and to inculcate both the teachings of religion regarding human brotherhood and the ideals of our democracy regarding freedom and equality as a more solid basis for genuine and lasting acceptance by the people of the states."

[66] *To Secure These Rights*, U. S. Gov. Print. Off. 1947, p. 168: "There is a substantial division within the Committee on this recommendation. A majority favors it."

It is significant that the President has not recommended those sections of the report of the majority of his Civil Rights Committee or the Committee on Higher Education regarding the elimination of separate schools in the South.

4. The Texas Bi-Racial Committee's Recommendations

In 1944, a study was made at the direction of the Bi-Racial Conference on Education for Negroes in Texas.[97] The personnel on the Committee, representing educators of both races, was of very high calibre.[98] It considered five alternatives for improving Negro education at the graduate and professional level: (1) Admit Negroes to the white universities; (2) Provide subsidies for out-of-state study; (3) Regional education; (4) *Establish a new state university for Negroes;* (5) Add graduate and professional schools to existing colleges. The Committee's recommendation for the establishment of a new State university was followed by the State Legislature. (Ex. 16, R. 83.)

With regard to the first alternative, the admission of Negroes to existing State universities for white students, the report stated at page 83:

> "Admission of Negroes to existing state universities for whites is not acceptable as a solution of the problem of providing opportunity

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[97] Respondents' Original Exhibit 16, R. 322, 323.

[98] Dr. J. J. Rhodes, Negro, President of Bishop College; Dr. W. R. Banks, Negro, Principal of Prairie View College; Dr. H. E. Lee, Negro; Dr. T. D. Brooks, Dean of Graduate School, Texas A. & M.; Mrs. Joe E. Wessendorf, past president of the Texas Parent-Teachers Association; and Dr. T. W. Currie of the Austin Theological Seminary. (R. 323.)

for graduate and professional study for Negroes on two counts: (1) public opinion would not permit such institutions to be open to Negroes at the present time; and (2) even if Negroes were admitted they would not be happy in the conditions in which they would find themselves."

5. The Texas Poll

About the time the Legislature convened in 1947 to consider the establishment of the Texas State University for Negroes, and before the trial of this case in May 1947, the Texas Poll, an independent statewide survey of public opinion which was and is carried in most of the Texas leading newspapers, published the following results of a poll of Texas opinion *on this very subject:*

"Most Negroes agree with the overwhelming sentiment of the white population in Texas that the Legislature should provide colored students with a first-class university of their own instead of allowing them to enter the University of Texas.

"Negroes vote 8 to 5 in favor of a separate university, as compared with a ratio of more than 25 to 1 among eligible white voters.

"The Texas Poll put the question to a representative cross section of adults in this form:

" 'Under a Supreme Court ruling, Texas is faced with the problem of either setting up a first-class university for Negroes or allowing them to enter the University of

Texas. What do you think ought to be done?'

"Here are the results, broken down to show the opinion of the 86 per cent of the people who are white and the 14 per cent who are Negroes:

	White	*Negro*
Set up separate university	79%	8%
Allow them in U.T.	3	5
Ignore court ruling	1	—
Don't Know	3	1
	86%	14%[99]

The Texas Poll in its survey released March 18, 1950, found that "the general attitude of the adult public [was] much the same as it was two years ago." The poll, which is set out in full in the Appendix, continues:

> "The results show that only Negroes, as a group, give a majority vote to the idea of teaching both races in the same universities. A substantial minority of college-trained adults supports this view, but the lower educational levels who make up the greater portion of the population are strongly opposed.
>
> "Some who favor the general policy of barring Negroes from the University say they would not object if one or two were admitted

[99] The poll is set out in full on p. 86, Appendix to Respondents' Original Brief. The report continued, "In this survey, as in all scientific samplings by The Texas Poll, every person gave his opinion in strict confidence. To encourage Negro respondents to voice their opinions freely, the Poll uses trained colored interviewers to contact a cross section of their race."

to the law school or if advanced students were allowed to enroll in graduate courses not available elsewhere in Texas. But the majority of Texas adults is opposed even to these exceptions."

6. The Position of the Federal Council of Churches

The Federal Council of Churches of Christ has by *amicus* brief stated to the Court its position that separation of the races is "unnecessary and undesirable." To support its position it has introduced documents and opinion evidence not in the record.[100] It is therefore considered necessary to answer that brief by pointing out one of the strongest arguments in favor of the reasonableness of the classification in question.

The churches who comprise the membership of the Federal Council, of their own choosing, maintain in the South churches, church schools, and denominational colleges which are in fact separate for the white and Negro races.[101] This is true only in a

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[100] The State's reply to the Council's request for permission to file an *amicus* brief on the merits of this case is set out on page 228 of the Appendix. The fact of the operation of separate schools by the churches was of course recognized by Respondents before. But it was not introduced into the case until the Federal Council itself raised it. Because Respondents feared that the Court might be misled by the Council's statement, it was felt necessary to reply thereto. The Council's practice is as important as its preachment.

[101] As an example in Texas, Southern Methodist University and Southwestern University are supported by the Methodist Church and attended by white students, whereas Samuel Huston and Wiley College are both Methodist-Episcopal schools for Negroes. In Tennessee the University of

lesser degree in the North.[102] They are fine schools and excellent churches, but they are separate just as the public schools are separate. The compelling reasons which caused the people of Texas to adopt such a policy undoubtedly were and are apparent to those forming the policy of the churches and their schools.

It certainly cannot be said that the policy of the churches in maintaining separate schools is based upon racial hatred and antagonism. The practice of the churches in the South and the policy of the State are the same with regard to schools and colleges.

7. Statement of Dr. Charles W. Eliot

While President of Harvard University, Dr. Charles W. Eliot addressed the Twentieth Century Club of Boston on the consequences of the *Berea College* decision, *supra*. Among other things he said,

> "If the numbers of whites and blacks were more nearly equal [in Boston] we might feel like segregating the one from the other in our

(Ftn. 101 Cont'd) the South (Sewanee) is a white, Protestant-Episcopal school; Maryville College for white students and Knoxville College, for Negro students are both Presbyterian. In Georgia, Wesleyan College is for white students and Paine College for Negroes; both are Methodist schools. In North Carolina Presbyterian-supported Johnson C. Smith University is for Negro students and Davidson is for whites. This is also generally true in the schools of churches not members of the Federal Council; *e. g.*, Baylor and Wake Forest Universities (Baptist) and T.C.U. (Christion). See Loescher, *The Protestant Church and The Negro*, 90-105 (1948).

[102] Loescher, *op. cit., supra*, at 51 *et seq.*; 36 Survey Graphic 59-62, January, 1947; Myrdal, *An American Dilemma* 636, 868-872 (1944).

own schools. It may be that as large and generous a work can be done for the Negro in this way as in mixed schools. . . .

"Perhaps if there were as many Negroes here as there, we might think it better for them to be in separate schools. At present Harvard has about 5,000 white students and about 30 of the colored race. The latter are hidden in the great mass and are not noticeable. If they were equal in numbers or in a majority, we might deem a separation necessary."[103]

After a tour of the South on which he made first-hand observations, Dr. Eliot concluded:

"The complete segregation of the colored people does not seem to me necessary in the Northern states, or wherever the proportion of negroes is small. It is unnecessary, for example, in the public schools of Boston and Cambridge. If, however, in any Northern state the proportion of negroes should become large, I should approve of separate schools for negro children." II *Charles W. Eliot* by Henry James (1930), p. 168.

8. Members of the Federal Judiciary

Federal District Judge John Paul[104] in December of 1947 considered anew the question of the reason-

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[103] Stephenson, *Race Distinctions in American Law*, D. Appleton & Co., 1910, p. 164.

[104] Republican member of 67th Congress; Special Assistant to U. S. Atty. Gen. 1924-25; U. S. Dist. Atty.; W. D. of Va., 1929-31; Federal District Judge since 1932; Phi Beta Kappa. (*Who's Who in America* 1950-51, p. 2125.)

ableness of a company rule separating the races on a common carrier. He said that,

> "It may be conceded that a regulation . . . which was deemed reasonable a generation ago, may not necessarily be so at the present time."

He concluded, after having heard witnesses on both sides of the question that:

> ". . . I am unable to say that as of today the prevailing practice in the Southern states of the separation of white and colored passengers on common carriers is arbitrary and without reasonable basis. . . . Among the witnesses in this case were the President of the defendant company and the Presidents of two other bus companies operating in Virginia, North Carolina and other Southern states. There was testimony also from public officials of the states of Virginia and North Carolina whose duties related to the supervision of motor carriers operating in those states. All of these witnesses agreed in the opinion that the separation of white and colored persons traveling by bus within the territory named was desirable and in the interest of both races. There is no ground for charging these witnesses personally with the harboring of racial prejudices and they testified with evident sincerity in expressing the view, born of their observation and experience, that the seating of white and colored passengers indiscriminately would increase the occasions for arguments, altercations and disturbances among passengers leading to annoyance, discomfort and possible danger to passengers of both races. The opinion of these men whose activities are concerned with the operation of

these carriers cannot be ignored in determining whether the rules adopted for the seating of passengers are reasonable ones. No matter how much we may deplore it, the fact remains that racial prejudices and antagonisms do exist and that they are the source of many unhappy episodes of violence between members of the white and colored races. If it is the purpose of the defendant here to lessen the occasions for such conflicts by adoption of a rule for the separate seating of whites and colored passengers, this court cannot say that such a rule is purely arbitrary and without reasonable basis.

". . . The fact that such separation has long been enforced in a number of states by custom and by the rules of common carriers operating in such states is a matter of public knowledge of which the members of Congress are fully aware. In fact, although efforts have been made over some years to induce Congress to enact legislation on this subject, it has consistently refused to attempt such regulation. There can be no other inference than that Congress has thought it wise and proper that the matter should be left for determination to such reasonable rules as the carriers might themselves adopt and that it considered that rules providing for the segregation of passengers in those sections where they were applied were reasonable ones. By its refusal to nullify the practices and regulations of these carriers in respect to the separation of passengers, Congress has by the strongest implication given its approval to them. This is a field of Congressional duty and responsibility. This court cannot invade it and, by usurping the powers of Congress, lay down rules by which this defendant must guide the operation of its business—rules which Congress, in the

exercise of power specifically and solely entrusted to it, has refused to lay down."[105]

The members of the Fourth Circuit Court of Appeals in December, 1948, considered and affirmed a judgment holding that the regulations of a carrier separating the races were reasonable, saying:

> "The adoption of a reasonable regulation by an interstate carrier for the segregation of passengers does not violate the law as laid down by the Supreme Court; and *in this case both the reasonableness of the regulation and the manner in which it was enforced were fairly submitted to the jury* and determined against the plaintiff."[106]

9. The People of Texas and Their Legislature Consider the Separation of the Races as a Necessary Exercise of the Police Power

Implicit in the material heretofore set out is that, among other reasons for the separation of white and Negro students, the people of Texas and its Legislature have considered such action to be a necessary exercise of the police power. Finding a necessity "to preserve the public peace and welfare" the Texas Legislature, as noted, enacted a statute in February, 1950, providing for a separation in the public parks. Underscoring the seriousness of the matter the statute authorized the closing of any facilities in the parks which are not equal until such time as the facilities are equal. Not a single vote was cast again the bill in the Senate of Texas.

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[105] *Simmons v. Atlantic-Greyhound Co.*, 75 F. Supp. 166 at 175.

[106] *Day v. A 'antic Greyhound*, 171 F. (2d) 59.

That this legislation is supported by the great majority of the people of Texas is shown by the Texas Poll of March 18, 1950, above referred to.

The examples of the recent breaches of the peace in Washington, D. C., and St. Louis, Missouri, set out in the *amicus* brief of the Southern States on pages 7-11 are illustrative.[107] Alfred H. Stone in his *Studies in the American Race Problem* relates how Kansas at one time operated its schools in Kansas City on a mixed basis. When what is described as occasional clashes culminated in the killing of a white student, the Kansas Legislature enacted a statute authorizing the separation of white and Negro students in that city.[108] That law is still in effect.

Texas has had no serious breaches of the peace in recent years in connection with its schools. The separation of the races has kept the conflicts at a minimum. The Texas Legislature, as evidenced by its 1950 enactment above referred to, believes that such separation is still necessary for the benefit of all.

Undoubtedly one of the things which gives rise to necessity for separation of the races is a historic antipathy of many of both races for a forced close personal, social contact. Beside the daily association in the classroom, at least some of which is social, universities and public schools officially maintain and sponsor extracurricular activities which do in-

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[107] That brief cites the events recently occurring in those cities when public swimming pools were opened to the races on a mixed basis and relates that because of the violence which followed, the Washington pool was closed and the St. Louis pools were returned to the policy of separation.

[108] Doubleday, Page & Co., p. 69, referring to Kan. Laws 1905, c. 414, p. 676.

volve close personal social contacts. For example, there are school dances, rooms or halls for visiting, dancing, for playing various games, swimming, and so forth. Also connected with colleges are dormitories where the living together is on a more or less intimate plane.[109]

The racial consciousness and feeling which exists today in the minds of many people may be regrettable and unjustified. Yet they are a reality which must be dealt with by the State if it is to preserve harmony and peace and at the same time furnish equal education to both groups.

In addition to the Constitutional and Legislative findings of the necessity for the separation of the races in order to preserve the peace, there is another ground of necessity for their separation not adequately stressed in the material heretofore set out. In the maintenance of the public schools, the State needs the support of all its people, both white and Negro. But as stated by Dean Benjamin Pittinger, if the power to separate the students were terminated,

> ". . . it would be as a bonzana to the private white schools of the State, and it would mean the migration out of the schools and the

[109] The point is illustrated in the case arising on the mixed campus of Ohio State University where the Home Economics Department maintained a house in which the students lived. In it they learned some of the many things necessary in the operation of a home. The college officials declined to register a Negro for that course and offered her an equivalent course. The highest court of that Northern State sustained the University's position. *State ex. rel. Weaver v. Ohio State University*, cited and discussed p. 30, *supra*.

> turning away from the public schools of the influence and support of a large number of children and of the parents of those children . . . who are the largest contributors to the cause of public education, and whose financial support is necessary for the continued progress of public education."[110]

It has been the policy of Texas to educate as many of its youth as possible in the public schools. The system, with the separation of the races, has grown and flourished with all classes of persons attending. Should the State be required to mix the public schools, there is no question but that a very large group of students would transfer, or be moved by their parents, to private schools with a resultant deterioration of the public schools. And among those white students in the low income group who could not afford private schooling, are many who are most likely to give physical expression to their racial feelings. The need for the exercise of police power

[110] R. 325-326. The fact of separation of the races has been a potent influence in encouraging attendance and support of the public schools in the South and it has contributed materially to their development and maintenance. Historically, the Peabody Foundation, a philanthropic organization of Massachusetts which contributed to the establishment of public schools in the South during the Reconstruction period, urged Congress to defeat the Civil Rights Bill of 1875 in so far as it provided for mixed schools. It was stated by Trustees of the Fund that mixed schools would "be most pernicious to the interests of education in the communities to be affected by it, and that the colored population will suffer the greater share of this disastrous influence." *Proceedings of the Trustees of the Peabody Educational Fund*, Oct., 1874 (1875), p. 403; Bond, *The Education of the Negro in the American Social Order* (1934), pp. 53-57; Boyd, *Some Phases of Educational History in the South Since 1865*, Studies in Southern History (1914), p. 262.

would continue to exist and the necessity for separate schools would become infinitely more apparent.

The above says in a plainer language a part of what is meant by many of the authorities and persons whose guarded and conservative conclusions have been set out heretofore as to the necessity for the separation of the races.

To summarize, there is ample evidence today to support the reasonableness of the furnishing of equal facilities to white and Negro students in separate schools. After much study for the United States Government, Dr. Ambrose Caliver concluded that "the *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions." He found that a very large group of Northern Negroes came South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more "secure" at a college of his own people.

Then there are the recommendations of the minority of those highly respected Americans who were appointed by the President of the United States to serve on his Committees on Higher Education and Civil Rights which believed it to the best interest of both races and their education, that the races continue, at least for the present, to be educated in separate schools. The views of these outstanding cit-

izens may not lightly be regarded as unreasonable. The President has not recommended the action of the majority of the Committee advocating mixed schools.

Closer to the situs of this case, the Texas Bi-Racial Committee, composed of outstanding white and Negro educators, concluded that the admission of Negroes to existing State universities for whites "is not acceptable as a solution of the problem." Its recommendation for the establishment of a new State university for Negroes was followed by the Legislature. The Texas Poll taken before that Legislature met found that "most Negroes agreed with the overwhelming sentiment of the white population in Texas that the Legislature should provide colored students with a first-class university of their own."

That the separation of persons of the Negro and white races in Texas is not based on racial hatred and antagonism is shown by the fact that churches, at least of the South, have separate congregations for white and Negro members, and operate church schools and colleges which are attended on a separate basis.

Dr. Charles William Eliot, President of Harvard for forty years, concluded after a tour of the South that "if in any Northern state the proportion of Negroes should become large, I should approve of separate schools for Negro children."

The Congress and the Legislatures of 17 states consider it desirable and necessary to provide separate schools. The legislative acts are based not only on the belief that it is the best way to provide education for both races, and the knowledge that separate

schools are necessary to keep public support for the public schools, but upon the necessity to maintain the public peace, harmony, and welfare. In addition to the material herein set out, the *amicus* brief of the Southern States ably develops the necessity for the exercise of the police power. The 1950 act of the Texas Legislature conclusively shows that it believes and finds that the necessity still exists.

The matter of the reasonableness of the classification has been considered and upheld recently by Federal judges and by a Federal jury. The members of this Court including many of its most outstanding jurists, in considering and deciding the cases set out in Point I, considered the classification to be reasonable.

It is respectfully submitted that there is ample evidence to sustain the reasonableness of the classification in question and that the prior decisions of this Court holding the classification to be reasonable should be followed.

C. If the Court Goes Behind Its Own Decisions and the Constitution and Statutes of Texas on the Question of Reasonableness, and If It Decides That It Has Not Sufficient Material From the Record, the Briefs, and Its Judicial Knowledge to Find Any Reasonableness in the Classification Made by Texas, the Southern States, and the Congress, Then, and Only in That Event, Respondents Are Entitled on a New Trial to Fully Develop That Proposition.

As heretofore stated, the trial court was of the opinion, based on the decisions of this Court, that the

sole question to be determined was whether the facilities offered Petitioner were substantially equal to those offered white students similarly situated.

That Court thus refused to go behind the provisions of the Texas Constitution and statutes on the question of the reasonableness of, or necessity for, those provisions. He excluded much of Petitioner's proffered testimony as to what happened at other places and at different times. His inquiry was limited to the particular facts of this *case*.

Respondents, also believing that the decisions of this Court were correct and were controlling, did not attempt to put on a complete case in defense of the Texas Constitutional provisions and statutes. Those provisions, with the decisions of this Court, were believed to be the law of the case; and it was tried accordingly.

If, however, this Court determines not to follow its former decisions or feels the necessity of an independent evaluation of the question of the reasonableness of the classification, it is believed and submitted that the matter herein present is ample to support the provisions of the Texas Constitution and Statutes which are involved.

But if, and only if, the Court here decides not to follow its former decisions, and if the Court determines that the classification must be struck down unless more is shown the Court, then the State is entitled to a new trial in which to fully develop the proposition.

Respondents do not wish to be misunderstood. While they confidently expect that this Court will follow its previous decisions, the principle in ques-

tion is too important to the State of Texas for any contingency or possibility, however remote, to be overlooked. It is only against the remote possibility that this Court may decline to follow its former decisions and be of the opinion that the matter here presented fails to show any reasonableness whatsoever that this point is preserved.

Fourth Point

The fact question of whether Petitioner was offered equal facilities is not properly before this Court because Petitioner did not present it to the Texas appellate courts for review. But assuming the issue to be properly before the Court, there is ample evidence to support the trial court's findings of fact and judgment.

1. The Fact Question As to the Equality of the Two Law Schools is Not Properly Before This Court.

It is elementary that whether two things are substantially equal to each other is a question of fact.

The trial court found as a fact, after hearing considerable evidence from all parties, that:

> ". . . this court is of the opinion and finds from the evidence that . . . the Respondents herein . . . have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors as the School of Law of The University of Texas; that

> such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas. . . . " (R. 440.)

The Court further found that:

> "From his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages. . . ." (R. 440.)

No exception was taken to such finding. In view of Petitioner's statement (R. 188) that he would not attend the separate school even if it were absolutely equivalent, it would appear that he is not in a position to argue about the equality of the facilities. He stated himself that as to him it made no difference. (R. 188.)

The same position was taken on appeal. The findings of fact of a court sitting without a jury, under the laws of Texas, have the same force and are entitled to the same weight as the verdict of a jury.[111] These findings will not be disturbed by a Texas appellate court where there is evidence to support them, even though the evidence may be conflicting.[112]

The Texas Courts of Civil Appeals have the power to reverse and remand where the evidence so pre-

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[111] *Bird v. Pace*, 26 Tex. 487 (1863); *Jordan v. Brophy*, 41 Tex. 283 (1874); *Rich v. Ferguson*, 45 Tex. 396 (1867); *Baldridge v. Scott*, 48 Tex. 178 (1877).

[112] *Gray v. Luther*, 195 S. W. (2d) 434 (Tex. Civ. App. 1946, error refused); *Highsmith v. Tyler State B. & T. Co.*, 194 S. W. (2d) 142 (Tex. Civ. App. 1946, error refused).

ponderates against the judgment that it should be set aside. Where there is no evidence to support the findings and judgment, the Courts of Civil Appeals and the Texas Supreme Court are empowered to reverse the case and render the proper judgment. [113]

Under Texas procedure it is necessary to invoke the jurisdiction of the appellate courts in this regard.[114] Petitioner did not do so.[115] As stated by the Court of Civil Appeals:

> "Our jurisdiction in the latter regard was not invoked in this case." (R. 461.)

Similarly, an examination of Petitioner's assignments of error on Motion for Rehearing in the Court of Civil Appeals will show that again he presented no assignment of error with regard to the fact finding of substantial equality. (R. 461-464.)

The Texas Supreme Court is empowered to reverse and render a case where there is no evidence

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[113] *Patrick v. Smith*, 90 Tex. 267 (1896); *Eastham v. Hunter*, 98 Tex. 560 (1905); *Sonora Realty Co. v. Fabens Townsite & Improvement Co.*, 13 S. W. (2d) 965 (Tex. Civ. App. 1929).

[114] *Wisdom v. Smith*, 146 Tex. 420 (1948); *DeWitt v. Brooks*, 143 Tex. 122 (1944); Rule 476, Tex. Rule Civ. Pro., *infra*, note 117.

[115] See Petitioner's points of error in the Court of Civil Appeals, Appendix, to Respondents' Original Brief, p. 105. The only assignment even approaching a challenge of the sufficiency of the evidence to support the fact finding was his 4th point which complained of the holding that "the proposal to establish a racially segregated law school afforded the equality required by the equal protection clause . . ." That assignment says that even if the two schools are identical, the fact that they are separate violates the 14th Amendment. It does not raise the question of the equality of the two "separate" schools.

to support the findings of fact and judgment.[116] But this point must first be made in the Motion for Rehearing in the Court of Civil Appeals.[117] There is no assignment of error in Petitioner's Application for Writ of Error to the Texas Supreme Court on the want of evidence to support the fact findings.[118] So in this case, the question of evidence to support the finding of fact as to the equality of the schools was not before the Texas Supreme Court.[119] It had no jurisdiction to consider this point.

It follows that the refusal of the application for writ of error by the Supreme Court of Texas was based solely on the law point as to the power of the State to provide separate facilities. Its jurisdiction on the question of whether there was evidence to support the fact finding of equality of facilities of the two separate schools was not invoked. Its refusal of the application for writ of error, therefore, could not be construed as a holding on whether there

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[116] *Schelb v. Sparenberg*, 133 Tex. 17 (1939); *Sovereign Camp W.O.W. v. Patton*, 117 Tex. 1, (1927).

[117] *Moore v. Dilworth*, 142 Tex. 538 (1944); *Railroad Comm. v. Mackhank Pet. Co.*, 144 Tex. 393 (1945). Rule 476 (Tex. Civ. Pro.) provides:

> "Trials in the Supreme Court shall be only upon the questions . . . raised by the assignments of error in the application for writ of error."

[118] Petitioner's Assignments of Error in the Texas Supreme Court are set out in the Appendix to Respondents' Original Brief page 106.

[119] This fact was pointed out by Respondents in their reply in the Texas Supreme Court. Their second point read in part, "No assignment of error was made as to such findings in Petitioner's Motion for Rehearing in the Court of Civil Appeals. There is no assignment in this Court that there is no evidence to support such findings." *Petitioner did not even reply to such point.*

was evidence to support that determinative finding of fact; the court had no jurisdiction as to that point.

With regard to cases involving disputed fact issues, this Court has announced that it accords great respect to the conclusions of the State judiciary. It has said:

> "That respect leads us to accept the conclusion of the trier of disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with . . . equal protection."[120]

At the same time, the Court has announced that in cases arising under the Fourteenth Amendment the Court feels that its duty "calls for our examination of the evidence to determine for ourselves whether a federal constitutional right has been denied."[121]

It is submitted that the Court is under no duty to make such an examination where Petitioner himself has not raised the point for the appellate courts of the State to pass upon.

This Court has stated many times that it will not review matters not presented to the State Courts. The statement by Mr. Chief Justice Stone in *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430 (1940), is particularly applicable here:

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and

[120] *Akins v. Texas*, 325 U. S. 398, 402, (1945).
[121] *Ibid.*, note 120.

then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . . *In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.* Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

". . . In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned."

Those "reasons of peculiar force" are particularly applicable here since Petitioner attacks the constitutional validity of the Texas Constitution as well

as its statutes. This Court has been unwavering in the application of the doctrine that it will not consider points not presented to the highest State court.[122]

Since the fact question of substantial equality was decided by the trial court contrary to Petitioner's contentions, and he failed to present his point to the State appellate courts, he is not now in a position to ask this Court to review that matter.

It is therefore respectfully submitted that this Court should accept the fact findings of the State court that the education offered Petitioner in this case was substantially equal to that offered white students similarly situated and that the decision in this case should be affirmed.

Petitioner asserts in his Point IV that this Court should strike down its previous decisions because separate schools can never be equal. In the first place, that assumes the answer to the question as to whether or not Petitioner was offered equal facilities in *this* case. The trial court found that he was. And before he can be heard to say that no facilities anywhere can ever be equal, it was incumbent on him to have the trial court's findings in *this* case set aside if he could. That he did not do in the Appellate Courts of Texas.

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[122] *Wilson v. Cook*, 327 U. S. 474 (1946); *Hunter Co., Inc., v. McHugh*, 320 U. S. 222 (1943); *Clark v. Williard*, 294 U. S. 211 (1935); *New York v. Klienert*, 268 U. S. 646 (1925); *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220 (1915); *Willoughby v. Chicago*, 235 U. S. 45 (1914); *Robinson & Co. v. Belt*, 187 U. S. 41 (1902); *Bolln v. Nebraska*, 176 U. S. 83 (1900).

By the assertion that separate schools or separate institutions of any kind, can never be equal, Petitioner expects this Court to judicially know all the facts as to all the places where separate facilities are now being offered to any groups, or which may hereafter be offered. Respondents say that the assertion is not only unfounded, but that there is no precedent for the use of judicial notice on such a scale on disputed facts. Discussing the exercise of judicial knowledge this Court said in *Brown v. Piper*, "Every reasonable doubt upon the subject should be resolved promptly in the negative." 91 U. S. 37, 43 (1875).

Furthermore the assertion that no separate Negro college with equal facilities could be equal to one for white students is to brand the Negro race with an inferiority to which Respondents cannot subscribe.

2. Assuming the Fact Question of the Equality of the Schools is Properly Before the Court for Determination, There is Substantial Evidence to Support the Fact Findings of the State's Trial Court.

An examination of the Record will show that there is substantial evidence to support the trial court's fact finding. As set out in the discussion by the Texas Court of Civil Appeals (R. 449), it is not required that the accomodations be identical. The test is whether they are substantially equal.[123]

[123] *McCabe v. A. T. & S. F. Ry.*, 235 U. S. 151: ". . . if facilities are provided, *substantial equality* of treatment of persons traveling under like conditions cannot be refused." *Hall v. DeCuir*, 95 U.S. 485: "*Substantial equality* or right is the law of the State and the United States, but equality does not mean identity. . . ." *Missouri ex rel. Gaines v. Canada*, 305 U.S 337: ". . . . the state is bound to furnish him within its borders facilities for legal education *substantially equal* to those which the state afforded for persons of the white race. . . . ."

The point may be illustrated by assuming a situation applicable only to white students. In most large cities in the South, there are several white primary schools. They generally differ in age, in beauty, in amount of playground available (depending on how far in town they are), et cetera. Some have more of this and less of that. Of course the white students are entitled to "equal protection." Yet parents cannot successfully demand the admission of their children to any particular school so long as the school to which their children are assigned is "substantially equal."

The principle is applicable here. The operation of the public schools, including publicly-owned colleges, requires the test to be "substantial equality." Identical facilities and physical plants are not required in assigning white students to schools for white children. Nor should it be required that white schools should be identical with Negro schools. All are schools furnished at the State's expense; and so long as each student is offered substantially equal facilities, he is afforded the equal protection of the laws.

As set out above, whether substantially equal facilities are offered students in different schools is a question of fact. Assuming the question to be properly before the Court, there is substantial evidence to support the State court's finding of fact. The following evidence in that regard was adduced in this case:

Entrance, Examination, Graduation, and Similar Requirements

The requirements for admission and fees, and regulations relating to the classification of students,

classwork, examinations, grades and credits, standards of work required, and degrees awarded *were exactly the same* as those published in the latest catalogue of The University of Texas and used at such institution. (Ex. 7, R. 85, 371-372; 82, 114, 160.)

The Faculty

The instructors at the School of Law of the Texas State University for Negroes at the time of trial were the *same professors* who had taught or were teaching the same courses at The University of Texas Law School. (R. 82-84, 113-114, 369-371, 83.) They were the same instructors Petitioner would have had if he had been enrolled in The University of Texas. (R. 113-114.) The instructions from the Board of Regents were to use all of the faculty of the University Law School, so far as necessary, in order to maintain a full curriculum at the Negro Law School until other full-time professors could be employed for the Negro Law School. (R. 121.) The budget provided for four professors at $6,000 per year, the same pay base for professors at The University of Texas. (R. 70.) Each of the instructors devoted all of his time to teaching; each a full-time professor. (R. 59-60.) With the small enrollment at the Negro Law School, the instructors would have been more available to the students for consultation than they would have been to students at The University of Texas with its large classes of 150 to 175 students. (R. 121-122.) The Dean and Registrar of the two law schools were respectively the same persons. (R. 372, 85.)

Curriculum

The curriculum at the Negro Law School and at The University of Texas *was exactly the same.* (R. 81, 82.) The courses offered beginning students at the Negro Law School *were identical with those offered beginning students at the University:* Contracts, Torts, and Legal Bibliography. (R. 84.) These courses, with the same professors, are set out in Respondent's Exhibit 7. (R. 85, 371-372.)

Classroom

The classroom requirements were identical. (R. 82.) With much smaller classes, the Negro Law School would have provided the student with more opportunity to participate personally in classroom recitations and discussions. (R. 306.) In an average law class at The University of Texas Law School a student would be called upon to recite only an average of 1½ times a semester. (R. 305.) In a smaller class the students would receive better experience and education; they would be called on more frequently, and would be more "on their toes." (R. 306.) The students would come to class better prepared because their chances of being called upon would be much greater; there would be a greater pressure to keep up their daily work. (R. 315.) Dean McCormick testified that "in the Negro Law School he [Sweatt] would have gotten a good deal more personal attention from the faculty than he would have had he been in the large entering class in The University of Texas." (R. 117.)

Library

At the time of trial, there were on hand in the Negro Law School books customarily used by the first-year class of the University, and other books which Miss Helen Hargrave, Librarian of the University Law School, thought would be useful. (R. 131.) There were about 200 of these books. (R. 21.) There were also available for transfer to the Negro Law School between 500 and 600 books from the University (R. 147), plus gifts of between 900 and 950 books. (R. 147.) In addition, the entire library of the Supreme Court of Texas was specifically made available to the Negro Law School by the Legislature. (R. 45.) The Supreme Court Library is located in the State Capitol Building on the second floor. (R. 6.) The Capitol grounds are some 20 feet from the Negro Law School, and the entrance is only about 300 feet from that School. (R. 37, 80.)

The Supreme Court Library contains approximately 42,000 volumes (R. 133), which number is far in excess of the 7,500-book minimum requirement of the American Bar Association. (R. 6.) Excluding duplicates, The University of Texas Law Library contains 30,000 to 35,000 books. Counting duplicates, it contains around 65,000. (R. 133.) These books serve 850 law students of The University of Texas. (R. 147.)

In some respects the Supreme Court Library is stronger than that of the University. Being a Governmental Depository, the Supreme Court Library automatically receives many reports, such as those

of administrative bodies. It is the strongest library in the South on State Session Laws. It contains Attorney General's Opinions, Tax Board Opinions, Workmen's Compensation Reports, and other items not carried by the University. (R. 132, 133.) The Supreme Court Library is more spacious for a student body of ten students than are the facilities at The University of Texas Law School Library, which are exceedingly crowded. (R. 79.) There is no more confusion, and, in most instances, less confusion, in the Supreme Court Library than at the Law Library of the University because of the large number of persons using the latter. (R. 146.)

On the other hand, the Supreme Court Library does not have as many textbooks, legal periodicals, or English reports as the University Law Library. (R. 131-132.) The Court's Library contains the Harvard, Columbia, Yale, and Texas Law Reviews, and the American Bar Association Journal. (R. 132.) It has the English Reports up to 1932.[124] The Law Library of The University of Texas and that of the Supreme Court are substantially equal except for the texts, legal periodicals, and English Reports. (R. 132-134.)

However, all of such texts, periodicals, and English Reports were readily available to the Negro Law School on a loan basis from the Law Library of The University of Texas. (R. 63-64.)

In addition, a complete law library was being procured. Of such number 1,281 books were immedi-

[124] The evidence showed that first-year law students rarely used the English Reports (R. 147-149).

ately available (R. 158), and 8,727 had already been requisitioned. (R. 155.) Orders had been placed for 5,702 of the books (R. 156), all deliverable within ten to sixty days. (R. 156.) Wherever new books were available, they were ordered; second-hand books were only ordered where new ones were not available. (R. 156.) The library requisitioned included 20 Law Reviews, Indices of Legal Periodicals, Citations, Digests, Restatements, textbooks, statutes, the complete West Publishing Company Reporter System, etc. (Respondents' Original Exhibit 8, R. 130.) The undisputed evidence is that the books ordered were sufficient to meet the requirements of the American Association of Law Schools. (R. 115.)

The Physical Facilities

Whereas The University of Texas Law School has three classrooms for 850 students,[125] the Negro Law School had two classrooms, a reading room, toilet facilities, and an entrance hall (R. 77; Respondents' Original Exhibit 4; R. 67), for a much smaller student body. The two law schools possessed approximately the same facilities for light and ventilation (R. 77, 88), though most law schools, including The University of Texas, need artificial light in the day-

[125] The Law School building at The University of Texas was built in 1902 for 400 students (R. 21); it now has 850 students (R. 79). The Texas Bar Association has been trying for years to get the building torn down and an adequate one built (R. 21).

time. (R. 89.) The Negro Law School, assuming at that time a class of ten students, had a greater floor space per student.[126]

The location of the Negro Law School at the time of the suit was particularly good. It was directly north of the State Capitol, separated only by a 20-foot street. (R. 37.) It was within 100 yards of the Supreme Court of Texas, the Court of Civil Appeals, the Attorney General's Office, and the Legislature. (R. 65.) It was between the business district of Austin and The University of Texas, eight blocks south of the University, and eight blocks nearer the business district. (R. 37.)

The building housing the Negro Law School was a three-story building of brick construction. (R. 164-170.) The first floor (not a basement) was occupied by the School at the time of trial (R. 41), but the upper two stories of the building were available as needed. (R. 47.) Before March 10, 1947, the premises were cleaned and painted. (R. 39.) The building had ample space to house the 10,000 volume library and leave sufficient space for classrooms and reading rooms. (R. 166.)[127]

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[126] The Negro school, first floor, had 1060 square feet, or 106 square feet per student. The University of Texas Law School has 46,518 square feet for 886 students, or 53 square feet per student. And this did not take into account the upper two stories of the Negro School which were available when needed (R. 47). The floor plan shows a classroom 12′ x 12′8″; a classroom 16′6″ x 11′6″, a reading room and office 19′10″ x 15′7″, and entrance hall and toilet facilities. Respondent's Original Exhibit 4.

[127] There are certain minor features of a law school greatly emphasized by Petitioner. As they would have been applicable to Sweatt himself, the evidence showed:

1. *The Law Review.* The Texas Law Review is not an official function of the State of Texas or the University.

With reference to the membership requirements of the Association of American Law Schools,[128] it was shown that the Negro Law School, at the time of this trial, met the great majority of the nine requirements:

(1) It was a school not operated as a commercial enterprise, and the compensation of none of the officers or members of its teaching staff was dependent on the number of students or the fees received. (R. 114.)

(2) It satisfied the entrance requirements; i. e., pre-legal training, etc. (R. 114.)

(Ftn. 127 Cont'd) It is a separate legal entity, a private corporation (R. 306). It was founded by the lawyers of Texas and financed by their contributions (R. 106, 112). Considerably more than half of the articles (as distinguished from case notes) are written by persons who are not University students (R. 306, 307). There is no rule which would permit the consideration or publication of an article written by a Negro (R. 307). Not all accredited schools have law reviews; for example, the Baylor Law School (R. 307). (At the time of trial.) Neither Sweatt nor any other first-year law student would be eligible to write for the law review (R. 105, 315-316).

2. *Scholarships*: All the scholarships offered at The University of Texas Law School are contributed from private sources; they do not come from the State (R. 103, 112).

3. *The Order of the Coif* is a private and not a public organization (R. 104, 112). First-year students are not entitled to admission. Students are eligible only on graduation (R. 112).

4. *The Legal Aid Clinic*: First-year students are not eligible to assist therein. Practically all the work is done by third-year students (R. 105, 112).

5. *Moot Court*: No first-year students are entitled or required to participate (R. 112, 102). Any one of the classrooms at the Negro Law School could be used for that purpose (R. 102).

[128] These requirement are set out in Relator's Exhibit 1 (R. 375-384; R. 5).

(3) The school was a "full-time law school." The school work was arranged so that substantially the full working time of the student was required at the school. (R. 114-115.)

(4) The conferring of its degrees was conditioned upon the attainment of a grade of scholarship attained by examinations. (R. 115.)

(5) No special students were admitted. In this, the School's requirement was stronger than that of the Association which permits such students under certain considerations. (R. 115.)

(6) The 10,000 volume library ordered for the School was sufficient to meet the library requirements. (R. 115.) The selection of the books was such as to conform with the Association's requirements. In addition, the Supreme Court Library of 40,000 volumes was available, plus loan privileges from the Law Library of The University of Texas. (R. 115; 63, 64.)

(7) The seventh requirement is that the "faculty shall consist of at least four full-time instructors who devote substantially all of their time to the work of the school." The professors in this case were full-time professors in the sense that all of their time was devoted to teaching. Howeve., all of their teaching was not done at the Negro school; they were also teaching at Texas University. (R. 116, 117.)

(8) Provision was made for keeping a complete and readily accessible individual record of each student. (R. 115.)

(9) The requirement reads: "It shall be a school which possesses reasonably adequate facilities and which is conducted in accordance with those standards and practices generally recognized by member schools as essential to the maintenance of a sound educational policy." Dean Charles T. McCormick, President of the American Association of Law Schools in 1942 (R. 76), testified that in his opinion the Negro Law School met this requirement. (R. 116.)

The testimony was that a two-year period is generally required before any law school may be admitted to membership in the Association of American Law Schools. Dean McCormick testified that he knew of no reason why the Negro Law School could not comply with all of those standards within that two-year period—before any entering student (including Petitioner) could graduate from the school. (R. 118.)

Regarding the Law School at the time of trial, Mr. D. A. Simmons, President of the American Judicature Society 1940-1942, and President of the American Bar Association 1944-45 testified:

> "In my opinion, the facilities, the course of study, with the same professors, would afford an opportunity for a legal education equal or substantially equal to that given the students at The University of Texas Law School." (R. 8.)

Dean Charles T. McCormick, President of the Association of American Law Schools, 1942 (R. 76), testified that facilities at the Law School for Negro citizens furnished to Negro citizens an equal op-

portunity for study in law and procedure (R. 85); that considering the respective use by the respective number of students, the physical facilities offered by the Negro Law School were substantially equal to those offered at The University of Texas Law School. (R. 78, 79.) He stated that:

> "I would say . . . the Negro student has at least equal and probably superior facilities for the study of law." (R. 108.)

Mr. D. K. Woodward, Jr., Chairman of the Board of Regents of The University of Texas, testified:

> "What we set up there was a plant fully adequate to give the very best of legal instruction for the only man of the Negro race who had ever applied for instruction in law at the University in about 63 years of the life of the School." (R. 48.)

> "I am talking as a man familiar with what it takes to provide a thorough training in law in the state of Texas, and I stated the facts within my own personal knowledge, that the facilities which the Board of Regents of the University set up in accordance with Senate Bill 140 are such as to provide the Relator in this case the opportunity for the study of law unsurpassed any time elsewhere in the State of Texas, and fully equal to the opportunity and instruction we are offering at the University any day." (R. 42,43.)

It is submitted that these facts constitute sufficient evidence to support the State court's finding of

fact that the education offered Petitioner was substantially equal to that offered white students similarly situated.

Addendum

The facts regarding the School of Law of Texas State University have materially changed since the trial of this case.[129] They have changed to such an extent that even assuming the fact question of the equality of the two schools is before the Court, it might well consider that such issue is moot. In this connection it will be remembered that Petitioner testified that no matter how equal the separate Law School might be, he would not attend it. (R. 188.)

These facts are set out to show the good faith of Respondents and the State of Texas, and to refute the statements and insinuations of Petitioner and his *amici curiae* that the State is offering a "basement" type of legal education to its Negro students.[130] They are also set out because this is a mandamus ae-

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[129] This Court may consider any change in facts supervening since the judgment was entered. *Gulf C. & S. F. Ry. v. Dennis*, 224 U. S. 503 (1912); *Watts, Watts & Co. v. Unione Austriaca*, 248 U. S. 9 (1918); *Missouri ex rel. Wabash Ry. v. Public Service Comm.*, 273 U. S. 126 (1927); *Patterson v. Alabama*, 294 U. S. 600 (1935); *Villa v. Van Schaick*, 299 U. S. 152 (1936).

[130] The good faith of the State is further evidenced by the teaching of a Negro at the Medical School of The University of Texas at Galveston. Since the State has no separate medical school for Negroes, he is being taught there pursuant to a contract between The University of Texas and Texas State University. The State is simply following the *Gaines* case.

tion in which equitable principles are applicable.[131] In this case the Petitioner is seeking an order from this Court directing his admission to The University of Texas. As stated under Section C of Respondents' Point III, Respondents confidently expect that this Court will follow its previous decisions; and even assuming the fact issue of the equality of the schools to be before the Court, that it will agree that there is substantial evidence to support the State Court's fact findings. But, as stated, the case is too important to the State to leave unconsidered any contingency, however remote. Should the Court therefore disagree with courts of Texas and with respondents on the issues regarding the facts in this case, these supervening facts should be before the Court to assist it in arriving at its judgment as to the proper disposition to be made of the case.

Supervening Facts

1. **Accreditation.** The Law School of Texas State University has been granted provisional approval by the American Bar Association. The "provision" is that it continue to maintain its present high standards for a reasonable length of time. It has been found to meet the Standards of the American Bar Association.[132]

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[131] *United States v. Dern*, 289 U. S. 352 (1933) and cases therein cited.

[132] "The Council has found your school not to be in full compliance with its standards but to exceed those standards in many respects. We have no doubt that your school will continue to comply . . . ." Letter of John G. Hervey, Advisor of American Bar Association, Section on Legal Education and Admissions to the Bar, to the Dean of the T.S.U. Law School set out in the Appendix, p. 225. See also the announcement of approval. Appendix p. 224.

The school, including of course its faculty, has also been found by the American Association of Law Schools to meet its standards.[133] Its accreditation was delayed pending the outcome of this lawsuit and for that reason only. Petitioner, who brought this suit, cannot complain about that condition.

2. **Library.** The testimony on the trial of the case was that some 10,000 volumes of law books had been ordered (R. 155, 158.) As of the time of Respondents' reply brief on Petition for Certiorari, some 16,300 volumes (including those listed as ordered on the trial) were in its shelves.[134] The latest official catalogue of that law school shows that over 23,000 volumes are in its library. It is still growing.

3. **Student Body.** As of the time of the latest report of the State Auditor, there were 23 Negro students in the law school.[135] The school maintains a practice court, bar association, and legal aid clinic for its law students.[136]

Henry Doyle, who enrolled in the law school shortly after the trial of this case in May, 1947, has successfully passed the Texas Bar Examinations and is licensed to practice law in all the State Courts of Texas.[137] The same opportunities were of course avail-

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[133] Appendix p. 227.

[134] See the Report of the Auditor and the Report of the Regents of that University to the Governor of Texas set out on pages 99 and 95 of Appendix to Respondents' Original Brief.

[135] See Report of the Auditor to the Governor of Texas in the Appendix to Respondents' Original Brief, p. 100.

[136] Bulletin of Texas State University School of Law, 1949-50, pages 6, 7.

[137] Appendix p. 227.

able to Petitioner who could have had his license to practice by now. Others will become eligible to take those examinations in the near future. Over 2,000 students are in other divisions on the campus of this university.[138]

4. **Physical Facilities.** The law school has moved into exclusive possession of an entire floor of one wing of a new two-million-dollar-building. The attached pictures will show that the building is modern in design and that the equipment is first-class.[139]

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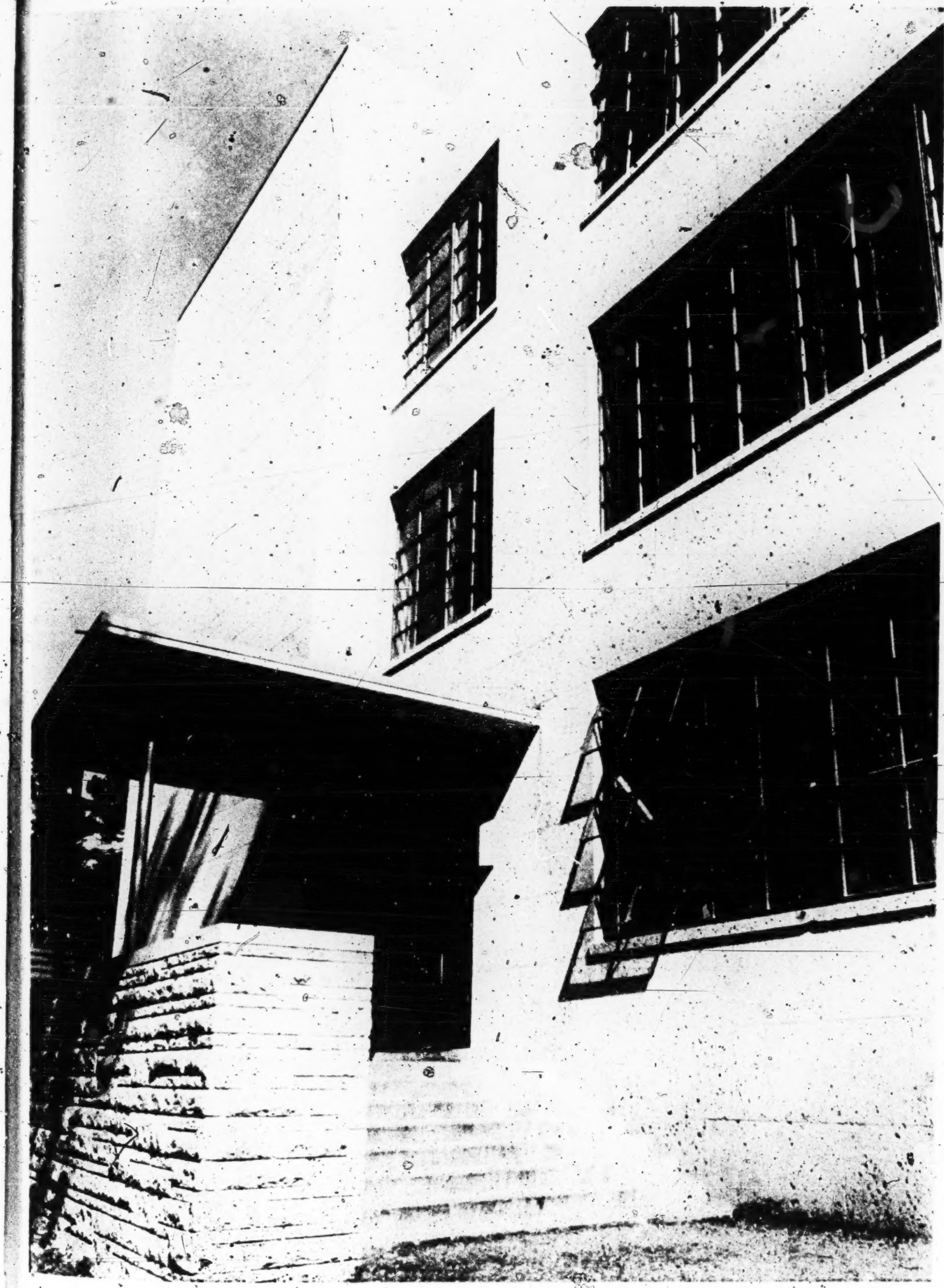
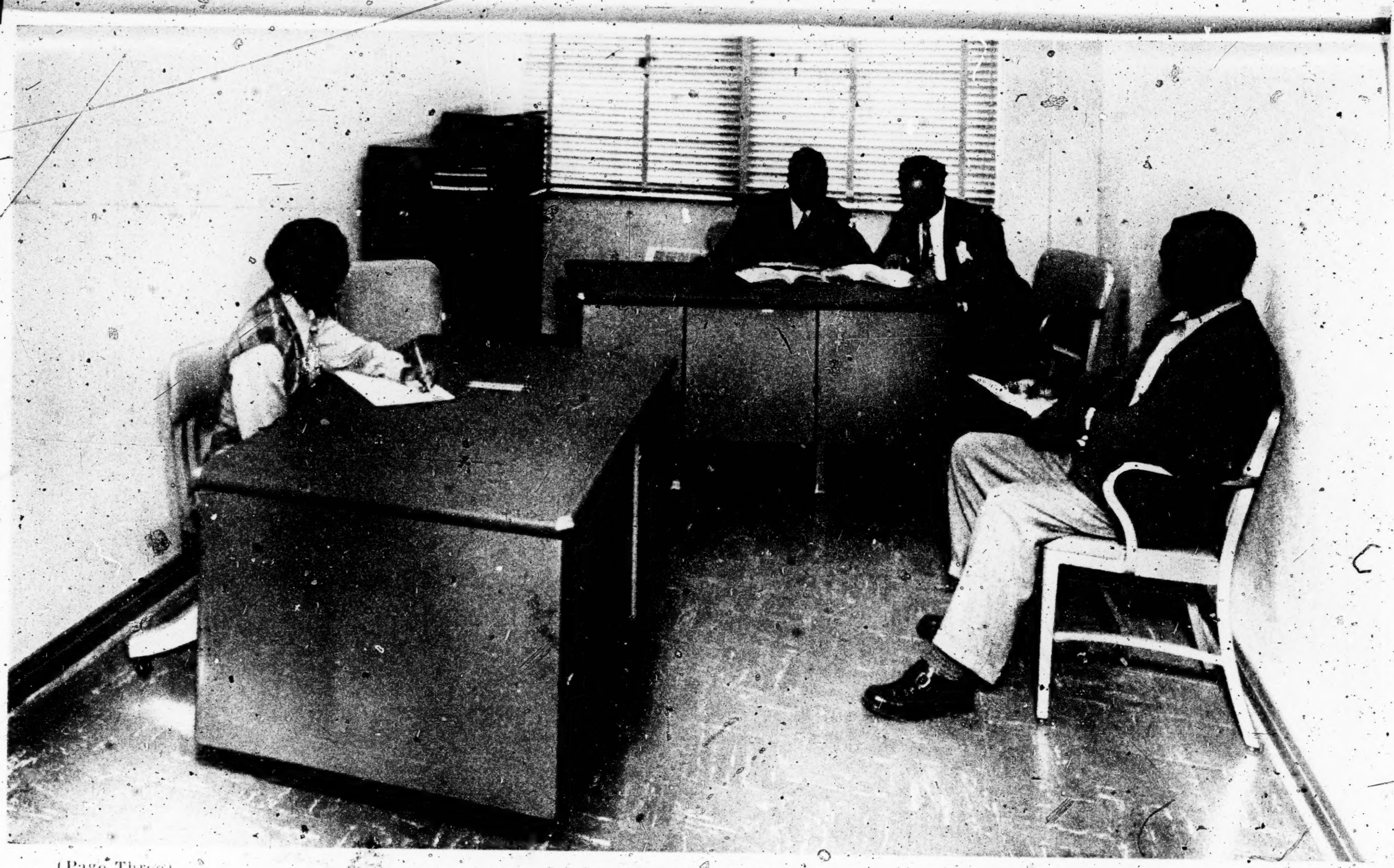
[138] *Ibid.* note 135, *supra.*

[139] The pictures are of a portion of the exterior of the building in which the Law School is housed, p. one of photographs which follow; a classroom in the Law School, p. two of photographs; a law professor's office, p. three of photographs; and the hall between the law classroom and the law library, p. four of photographs.



Entrance to T. S. U. Law School.

Classroom at T. S. U. Law School.



A Law Professor's Office.

Hall Between Law Classrooms and Law Library. (Page Four).

Summary and Conclusion

The previous decisions of this Court have announced the law applicable to this case: that the States, which are not required by the Federal Constitution to maintain any schools, may provide education to white and Negro students in separate schools so long as equal education is offered to both groups. Attending a public school or university is a *privilege* extended by the State. It is not a *right* of a citizen of the United States. So long as the privileges extended to all groups are equal, no one is deprived of the equal protection of the laws.[140]

The principle was summarized by this Court in the *Gong Lum* decision:

> "The question here is whether a . . . citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white,

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[140] Mr. Justice Clifford in the *DeCuir* case: ". . . equality of rights does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; . . . any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either."

Mr. Justice Harlan in the *Cumming* case: ". . . while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States. . . ."

> brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution."

This Court in the *Gaines* case, following its former decisions, referred to the system of furnishing equal education in separate schools as "a method the validity of which has been sustained by our decisions."

Those opinions correctly interpret the meaning of the Fourteenth Amendment and the intention of the Congress which proposed it and of the Legislatures of the States which adopted it. The review herein set out clearly shows that the Amendment was not intended to require mixed schools. On the contrary, as unmistakable evidence of its interpretation of the amendment, the Congress which proposed the amendment enacted legislation continuing its separate schools both during and after the adoption of the amendment. The State Legislatures likewise, with the exception of the very few states which preferred mixed schools of their own volition, continued to operate their separate schools.

Those decisions of this Court also properly refused to strike down, as an unreasonable exercise of the State's police power, the State Constitutions and Statutes providing for equal education of white and Negro students in separate schools. There is ample evidence today for the reasonableness of and neces-

sity for such separation.[141] The Texas Legislature found that such a necessity existed as late as February, 1950.[142] Dr. Ambrose Caliver of the United States Office of Education concluded that in some of the States, the *mores* of race relationships ruled out for the present at least the possibility of admitting white persons and Negroes to the same institutions; that there was much evidence that Negroes had a more normal social life and had a better chance to develop leadership at a separate college. Dean Pittenger pointed out that forced mixed schools would be a bonanza to the private schools of Texas, and would cause large withdrawals from the public schools; that the public schools need the continued support of all citizens; and that a great amount of that public support would be lost by a mixing of the races in the schools. The Texis Bi-racial Committee concluded that the admission of Negroes to existing state universities for white students was not acceptable at this time for the solution of providing opportunity for graduate and professional work. The

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[141] It will be remembered that the question of the reasonableness of the classification was not tried out in this lawsuit because the trial court, correctly we think, considered that this Court had settled the matter. If, and only if, the Court disagrees with its former decisions and feels that it has not sufficient material before it to sustain the classification, then Respondents are entitled to a new trial to fully develop that proposition.

[142] That the Legislature has accurately reflected the feelings of the Texas people is shown by the Texas Poll surveys of 1947 and 1950. The 1947 poll showed that the great majority favored a first-class university for the Negroes rather than the mixing of the races. Those feelings had not changed in 1950.

maintenance by the churches in the South of separate schools and colleges demonstrates that the policy of separation is not based on hatred and antagonism. A substantial minority of those outstanding citizens appointed by the President on his Committees on Higher Education and Civil Rights were not in favor or forced mixed schools at this time.[143] This and the other evidence set out in the brief demonstrate that the policy of the people of Texas is not wholly without reason.

The trial court found as a fact that Petitioner was offered facilities and advantages substantially equal to those offered white students at The University of Texas. Petitioner did not present that fact issue to the appellate courts of Texas. The fact question is therefore not properly before this Court. But assuming that it is, there is substantial evidence to support the fact finding.

The supervening facts all of which are not now before the Court, show that the law school of Texas State University has grown and expanded since the trial of this case. It has been found by the American Bar Association and the American Association of Law Schools to meet their standards.

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[143] That group includes Dr. Arthur H. Compton, Chancellor, Washington University, St. Louis; Douglas S. Freeman, Editor, Richmond Times-Dispatch; Lewis Jones, President, University of Arkansas; Goodrich C. White, President, Emory University, and Senator Frank P. Graham of North Carolina, formerly President of the University of North Carolina. Dr. Charles W. Eliot, former President of Harvard, said that if the proportion of Negroes in the North should become large, he would approve of separate schools.

It is therefore respectfully submitted that this case should be affirmed.

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APPENDIX

FIRST SECTION

The Background and Contemporaneous Construction of the Fourteenth Amendment Sustain the States in Their Power to Regulate Their Schools, Including the Right to Have Separate Equal Schools for White and Negro Students.

I. CONGRESSIONAL ACTION: HISTORY OF STATUTES RELATING TO SCHOOLS AND CIVIL RIGHTS AND OF THE ADOPTION OF THE FOURTEENTH AMENDMENT.

A. The Period 1861-1865 Preceding the Proposal of the Fourteenth Amendment During Which Time Congress Established Separate Schools in the District of Columbia.

The policy of the Congress from the beginning has been to provide separate schools for white and Negro children. After the abolition of slavery in the District in April, 1862, the Congress on May 20, 1862, enacted a bill to provide instruction for Negro and white youth outside the cities in Washington County.[1] A board of commissioners was empowered to provide schools for Negro children to be supported by a tax on Negro property. On May 21, 1862, a bill was enacted "providing for the education of colored children in the cities of Washington and George-

[1] 12 Stat. 394 (1862); Statutes 1861-62, Ch. 77. All numbers in parentheses refer to page numbers in the Congressional Globe through 1873 and to the Congressional Record thereafter. All material in this portion of the Appendix is from those sources unless otherwise indicated.

town," to be supported by a tax on Negro property in the cities.[2]

On July 11, 1862, an Act was approved "relating to schools for the education of colored children in the District of Columbia" which created another board, known as the "Board of Trustees for Colored Schools," to manage the Negro schools and handle their funds.[3]

Edward Ingle observed that these Acts were ineffectual because insufficient funds were raised, and that it was not until March, 1864, that the first Negro school was opened in the District.[4]

On June 25, 1864, Congress enacted a law repealing the portions of the Acts of May 20, 1862, supporting Negro schools by taxation on Negro property only. It provided that a proportion of all school funds raised in Washington and Georgetown should be set aside for Negro schools in the proportion that the number of Negro children bore to the number of white children.[5]

B. The Period of the Adoption of the Fourteenth Amendment 1866-1868.

On January 5, 1866, Senator Trumbull introduced the first supplemental Freedmen's Bureau Bill, pro-

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[2] 12 Stat. 407 (1862); Statutes 1861-62, Ch. 83. No public provision for the Education of Negro children of the District of Columbia was made prior to these acts. H. R. Exec. Doc. No. 315; 41st Cong., 2nd Sess. (1869-70).

[3] 12 Stat. 537 (1862).

[4] Ingle, *The Negro in the District of Columbia*, Johns Hopkins University, 11th Series (1893), p. 25.

[5] Special Report of Commissioner on Education 1871, p. 65; 13 Stat. 187 (1864).

viding, among other things, for certain civil rights for Negroes "such as the right to enforce contracts, sue, give evidence, inherit, and to sell, lease, or convey realty."[6] On the same day he introduced what became the Civil Rights Act of 1866. Unlike the Freedmen's Bill which was applicable only to the South, it was applicable to all the States.

1. *The First Supplemental Freedmen's Bureau Bill.*

This bill was one of the forerunners of the 14th Amendment, and is important in examining the intended effect of the Amendment. It provided certain specific civil rights for the recently emancipated Negroes. However, most of its provisions dealt with the government of the defeated South.[7] Section 6 empowered a Commissioner to provide buildings for

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[6] II James G. Blaine, *Twenty Years in Congress* (1874), pp. 209-210; Cong. Globe, 39th Cong., 1st Sess., p. 129; Flack, *The Adoption of the Fourteenth Amendment*, p. 12. The first Freedmen's Bureau Bill was enacted in March 1865. It made no reference to education. 38th Cong., 2nd Sess., p. 96. Lee had surrendered in April of 1865. Lincoln, who was assassinated in April, 1865, had been succeeded as President by Andrew Johnson of Tennessee. Almost from the beginning, Johnson and the Congress were at odds on Reconstruction policy. The feud ended in an unsuccessful attempt to impeach Johnson. It will be remembered that all during this period, the Representatives and Senators from most of the Southern States were not allowed to take their seats in Congress. So of course the South had no voice in the passage of these acts.

[7] 39th Cong., 1st Sess., pp. 209, 314, 339, 362, 392, 415. The bill was debated in the Senate January 19-25, 1866.

asylums and schools for the freedmen.[8] There is nothing in the debates that indicated that Congress intended these schools to be mixed schools. A few members, speaking against the bill, expressed the fear that it might be construed to force mixed schools.[9]

Sections 7 and 8 dealt with specific civil rights of the freedmen. Section 7 provided that if, because of any State or local law, custom, or prejudice "any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes . . . on account of race . . . it shall be the duty of the President of the United States, through the Commissioner, to extend military protection . . . over all cases affecting such persons so discriminated against."[10]

Section 8 provided that if any person subjected any Negro or other person, on account of race, "to

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[8] *Id.* at 395. It was provided that no contracts for such buildings should be let until congressional appropriation had been made therefor.

[9] Dawson of Pennsylvania, speaking more of the theories of certain radical Republicans, indicated that they would like to force mixed schools. 39th Cong., 1st Sess., p. 541. Rousseau of Kentucky informed the House that in Charleston, S. C., the four public schools had been taken over for the exclusive benefit of Negroes. The person in charge of the schools said, "The white children, of course, do not attend." 39th Cong., 1st Sess., Appendix, p. 71.

[10] *Id.* at 318; these sections are discussed in Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 13 *et seq.*

the deprivation of any civil right secured to white persons, or to any different punishment . . ." he should be guilty of a misdemeanor.[11]

The bill passed the Senate January 25, 1866,[12] and passed the House with amendments not relevant here, on February 6, 1866.[13] There was some discussion of Section 6 with reference to schools, but it had to do with providing some type of education for the Negro. Rep. Donnelly made it plain that the Negro should be educated by Northern teachers so they wouldn't be educated to glorify Robert E. Lee and the Southern tradition.[14]

President Johnson vetoed the Act on February 19, 1866.[15] The bill failed to get the necessary two-thirds vote to override the veto.[16]

As was the case with the Civil Rights Bill, there were many members of Congress who thought the Act unconstitutional. Flack says, "There seems to

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[11] 39th Cong., 1st Sess., at 319.

[12] *Id.* at 421.

[13] *Id.* at 688. The Senate agreed to the House Amendments and made an additional amendment on February 8, 1866 (p. 748). The House agreed to the Senate Amendment February 9, 1866 (p. 775). The bill was debated in the House from Jan. 26 through Feb. 2. (*Id.* at pp. 512, 538, 585, 618.)

[14] *Id. at* 585.

[15] *Id.* at 915.

[16] *Id.* at 943, February 20, 1866; a similar bill was enacted over the President's veto in July, 1866, after the resolution proposing the 14th amendment had been enacted. 14 Stat. 173 (1866); See Flack, *The Adoption of the Fourteenth Amendment*, pp. 18, 19.

be little doubt but that it was unconstitutional and that it could scarcely be justified even as a war measure."[17]

2. *The Civil Rights Act of 1866*

In interpreting the intent and scope of the 14th Amendment, this bill, another forerunner, is particularly important because its provisions had a definite bearing on the adoption and meaning of the first section of that amendment.

On January 29, 1866, Senator Trumbull explained the extent of his Civil Rights Act of 1866:

> "The right to make and enforce contracts, to sue and be sued, to give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to full and equal benefit to all laws and proceedings for the security of person and property."[18]

The bill, in section one, defined citizenship in the United States:

> "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[19]

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[17] Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 14. Flack observed that "the measure was unwise and inexpedient to say the least of it, for it retarded rather than aided reconstruction."

[18] 39th Cong., 1st Sess., pp. 476, 599.

[19] 14 Stat. 27 (1866).

It continued, as originally introduced, with broad general provisions as to civil rights:

> "That there shall be no discrimination in the civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color . . . . shall have the same rights to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none others, any law, statutes, ordinance, regulation, or custom to the contrary notwithstanding."[20]

When this bill was before the House on March 1, 1866, its floor leader was Rep. James F. Wilson of Iowa, Chairman of the Judiciary Committee, to which the bill had been committed. He explained the broad language of the bill, and assured the House that the bill did not refer to schools and did not require mixed schools:

> "This part of the bill will probably excite more opposition than any other. . . . What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? *By no means can they be so construed. . . . Nor*

[20] 39th Cong., 1st Sess., pp. 474, 1117.

do they mean that . . . their children shall attend the same schools. These are not civil rights or immunities."[21]

Wilson therefore moved that the bill be recommitted to committee.[22]

Rep. Bingham of Ohio also thought the language of the bill was too broad.[23] He moved to amend the motion to recommit the bill to add instructions to the committee:

> "to strike out of the first section the words 'and there shall be no discrimination in the civil rights or immunities among citizens of the United States . . . on account of race, color, or previous condition of slavery . . .'"[24]

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[21] 39th Cong., 1st Sess., p. 1117. An illustration of the opposition to the broad language was shown in the speech of Rep. Rogers of New Jersey. He pointed out that Pennsylvania had separate schools for white and Negro children. He opposed Federal intervention into the State's affairs. He characterized the language of the bill as "broad and dangerous." 39th Cong., 1st Sess., p. 1121, March 1, 1866. Rep. Thayer of Pennsylvania was of the same view as Wilson on the limited extent of the bill: that the same general words of the bill were limited to the specific rights mentioned therein. (*Id.* at 1151.) Rep. Kerr of Indiana was alarmed at the possibility that the bill might force the mixing of whites and Negroes in public schools and churches (*Id.* at 1268). Senator Cowan of Pennsylvania said his State provided separate schools for the races and that it would be monstrous to have his school officials tried as criminals. (*Id.* at 500.)

[22] *Id.* at 1115, 1162.

[23] 39th Cong., 1st Sess., p. 1291. March 9, 1866.

[24] *Id.* at 1271-1272. His amendment also proposed the deletion of the criminal penalties and inserted civil liability in the Federal Courts. The amendment was defeated, but the bill was recommitted to committee. His suggestions were adopted by the committee.

In answer to Bingham and other representatives who objected to "the glittering generalities" of the bill, Wilson said that his bill did not "invade the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws." Referring to Bingham, Wilson said,

> "He knows, as every man knows, that this bill refers to those rights which belong to men as citizens of the United States and none other; *and when he talks of setting aside school laws . . . of the States* by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here."[25]

After the discussion, the bill was recommitted to committee on March 9, 1866.[26]

On March 13, 1866, Wilson brought the Civil Rights Bill out of committee. It had amended the bill as Bingham had suggested: *i. e.*, it took out the broad, general language as to civil rights and named certain specific rights. Schools were not mentioned. The Committee Amendment read:

> "Strike out . . . the following words:
>
> " 'Without distinction of color, and there shall be no discrimination in civil rights or im-

[25] 39th Cong., 1st Sess., p. 1294.
[26] *Id.* at 1296.

munities among citizens of the United States . . . on account of race, color, or previous condition of slavery.'

"So that the section will read as follows:

" 'That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.' "

Wilson explained the committee's action:

". . . the amendment . . . proposes to strike out the general terms relating to civil rights. I do not think it materially changes the bill. . . ."[27]

". . . Some members of the House thought, in the general words of the first section relating to civil rights, it might be held by the courts

[27] 39th Cong., 1st Sess., p. 1366.

that the right of suffrage was included in those rights. To obviate that difficulty *and the difficulty growing out of any other construction beyond the specific rights named in the section*, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section."[28]

With a few other changes immaterial here, the bill passed the House March 13, 1866.[29] When the bill was returned to the Senate, it was referred to the Judiciary Committee. On March 15, 1866, Senator Trumbull reported the bill to the Senate with the committee's recommendation that the bill be passed as amended in the House. The Senate adopted the House amendments without debate on March 15, 1866.[30]

President Johnson returned the bill to Congress with a veto accompanied by a long veto message on March 27, 1866. It was passed over the veto in the Senate on April 6, 1866, and in the House on April 9, 1866.[31] The bill thus became law on April 9, 1866.[32]

That Congress did not interpret this Act as prohibiting separate equal schools for whites and Negroes is evidenced by the fact that separate schools for children of the two races continued to be maintained by Congress in the District of Columbia after its effective date. (The New York Court in 1869

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[28] 39th Cong., 1st Sess., p. 1367.
[29] *Id.* at 1367.
[30] *Id.* at 1413-1416.
[31] *Id.* at 1679, 1808, 1861.
[32] 14 Stat. 27 (1866).

held that this Act did not invalidate separate schools for white and Negro students in Buffalo, N. Y. *Dallas v. Fosdick*, 40 How. Prac. 249. The Indiana Court in 1874 ruled to the same effect. *Cory v. Carter*, 48 Ind. 327.)

There were many in the Congress who believed the Civil Rights Bill of 1866 to be unconstitutional.[33] Mr. Bingham of Ohio, an anti-Southern leader and a member of the Reconstruction Committee, thought the bill unconstitutional because, among other things, it invaded the rights reserved to the States.[34] He therefore advocated the adoption of an amendment to the Federal Constitution.

3. *The Congressional Resolution Proposing the Fourteenth Amendment*

Many Republicans, either because they doubted the constitutionality of the Civil Rights Bill or because they feared that it might be repealed by some subsequent Congress, were desirous of writing some guarantee of this nature into the Constitution.[35] The result was their proposal of the Fourteenth Amendment. Because of the disagreement between Congress and President Johnson (who was carrying forward Lincoln's plan of reconstruction) there had

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[33] *E. g.*, Representatives Saulsbury of Delaware, Van Winkle of West Virginia, Cowan of Pennsylvania, Reverdy Johnson of Maryland, Davis of Kentucky, Guthrie of Kentucky, *et al.* See Flack, *op. cit. supra*, pp. 22-25.

[34] 39th Cong., 1st Sess., p. 1291.

[35] Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914) p. 215.

been established "The Joint (Congressional) Committee of Fifteen on Reconstruction," in which numerous reconstruction matters were decided upon, including the question of the (non) representation of the Southern States in the Congress.[36] So the resolution proposing the amendment was first considered in and approved by this policy-making committee.[37] During the course of the deliberations the committee rejected a resolution which contained a provision that

> ". . . all provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void."[38]

After extended deliberation a resolution was finally agreed upon by a vote of 7 to 6 on February 3, 1866, which provided that

> "The Congress shall have power to make all laws which shall be necessary and proper to

[36] The "Committee of Fifteen," established at the insistence of Mr. Thaddeus Stevens and other extreme anti-Southerners, was composed of 12 Republicans: Senators Fessenden of Maine, Grimes of Iowa, Williams of Oregon, Harris of New York, and Howard of Michigan, and Representatives Stevens of Pennsylvania, Bingham of Ohio, Conkling of New York, Boutwell of Massachusetts ,Washburne of Illinois, Morrill of Vermont, and Blow of Missouri. The Democrats were Senator Johnson of Maryland and Representatives Grider of Kentucky and Rogers of New Jersey. For an excellent history of the background and personnel of the Committee see Kendrick, *op. cit., supra*, at 133-197.

[37] *Id.* at 46 *et-seq.*

[38] *Id.* at 50.

secure to the citizens of each state all privileges and immunities of citizens in the several states; and to all persons in the several states equal protection in the rights of life, liberty and property."

On February 13, 1866, this resolution was introduced in the Senate by Senator Fessenden,[39] and in the House by Mr. Bingham.[40]

Mr. Bingham argued that the proposed resolution simply would grant Congress the authority to enforce existing Federal Statutes (including the 1866 Civil Rights Act) and the rights already guaranteed in the Federal Constitution.[41] This is in accord with the view he had previously expressed that he doubted the constitutionality of the Civil Rights Bill. Rep. Rogers, a Democrat of New Jersey, who was a member of the Joint Committee of Fifteen, arguing against the resolution, stated that Congress would have the power, in the future, to legislate with regard to schools.[42] The tenor of some other speeches was the same. Those in favor of the amendment argued that it merely gave Congress power to enforce existing constitutional and statutory provisions, and

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[39] 39th Cong., 1st Sess., p. 806. No action was immediately taken by the Senate.

[40] *Id.* at 813.

[41] 39th Cong., 1st Sess., p. 1033. He brought the matter before the House on Feb. 26, 1866, and after three days of debate it was deferred until April. *Id.* at 1033, 1095.

[42] 39th Cong., 1st Sess., Appendix, p. 133.

those opposed arguing that its grant of legislative power to Congress was too broad.[43]

Their first proposal having failed, the Joint Committee attempted to draft one which would secure the approval of Congress. After debating from April 21, 1866, the committee on April 28 decided upon a resolution, containing in Section 1 the provision:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[44]

No provision was offered in the meetings of the Joint Committee as reported in the Journal which would indicate that it was the intent of the Committee to enforce mixed educational facilities.[45] Along with the proposed amendment, the Joint Committee on Reconstruction prepared for Congress a majority and a minority committee report, neither of which made any reference to schools or indicated that the

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[43] 39th Cong., 1st Sess., pp. 1054-1067, 1083-1095. Mr. Higby (Cal.) 1054-1056; Mr. Randall (Pa.) 1056; Mr. Kelley (Pa.) 1057-1063; Mr. Hale (N. Y.) 1063-1066; Mr. Price (Iowa) 1066-1067; Mr. Davis (N. Y.) 1083-1087; Mr. Woodbridge (Vt.) 1087-1088; Mr. Bingham (Ohio) 1088-1094; Mr. Conkling (N. Y.) 1094-1095; Mr. Hotchkiss (N. Y.) 1095.

[44] Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914), p. 106.

[45] *Id.* at 37-129.

proposed resolution was to cover anything more than the civil rights already discussed and embodied in the Act of 1866.[46] The report for the majority[47] after reciting a history of the measures of reconstruction up to the time of the report, states that instead of being mere chattels, the former slaves had become free men and citizens. The report continues with regard to the freedmen stating that

> "It was impossible to abandon them, without securing them their rights as free men and citizens. . . . Hence it became important to inquire what could be done to secure their rights, civil and political. It was evident to your committee that adequate security could only be found in appropriate constitutional provisions. . . ."[48]

The majority then reviews the evidence on the state of affairs in the former Confederate States, and on the basis of this evidence the opinion of the majority of the committee was that

> "Congress would not be justified in admitting such communities to a participation in the government of the country without first providing

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[46] II *Reports of the Committees of the House*, 39th Cong., 1st Sess., VI-XXI, 1-13.

[47] Signed by Fessenden, Grimes, Harris, Howard, Williams, Stevens, Morrill, Bingham, Conkling, and Boutwell.

[48] II *Reports of the Committees of the House*, 39th Cong., 1st Sess., XIII.

such constitutional or other guarantees as will tend to secure the civil rights of all citizens of the republic . . ."[49]

In summary the conclusions of the majority were:

"The conclusion of your committee therefore is, that the so-called Confederate States are not, at present, entitled to representation in the Congress of the United States; that, before allowing such representation, adequate security for future peace and safety should be required; that this can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic, shall place representation on an equitable basis, shall fix a stigma upon treason, and protect the loyal people against future claims for the expenses incurred in support of rebellion and for manumitted slaves, together with an express grant of power in Congress to enforce those provisions. To this end they offer a joint resolution for amending the Constitution of the United States, and the two several bills designed to carry the same into effect, before referred to."[50]

The minority report[51] is devoted mainly to the legal proposition that the States which had seceded had never actually left the Union and were, therefore, entitled to immediate representation in Congress. Regarding representation the report stated:

"What danger to the government, then, can possibly arise from southern representation?

[49] II *Reports of the Committees of the House*, 39th Cong., 1st Sess., XVIII.

[50] II *Id.* at XXI.

[51] Signed by Reverdy Johnson, Rogers, and Grider.

> Are the present senators and representatives fearful of themselves? Are they apprehensive that they might be led to the destruction of our institutions by the persuasion or any other influence of southern members? . . . Whatever effect on mere party success in the future such a representation may have we shall not stop to inquire."[52]

Speaking of the plan of representation and the fact that the Negro was not granted suffrage, it was stated:

> "That would be obnoxious to most of the northern and western states, so much so that their consent was not anticipated; but as the plan adopted, because of the limited number of negroes in such states, will have no effect on their representation, it is thought it may be adopted, while in the southern states it will materially lessen their number . . ."[53]

This new resolution was introduced in both Houses of Congress on April 30.[54] Mr. Thaddeus Stevens opened debate in the House on May 8 and in reply to the contention that the Civil Rights of 1866 secured the same things as were placed in Section 1 of the resolution, he said that the bill was repealable and that repeal should be placed beyond the power of Con-

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[52] II *Reports of the Committees of the House*, 39th Cong., 1st Sess., p. 7.

[53] *Id.* at 9.

[54] 39th Cong., 1st Sess., pp. 2265, 2286.

gress.[55] Mr. Finck of Ohio stated that if the first section were necessary then the Civil Rights Bill was unconstitutional.[56]

Mr. Garfield of Ohio pointed out in answer to Mr. Finck that the reason for placing the provisions of the Civil Rights Bill in the Constitution was so that if the Democrats ever returned to power the bill could not be repealed.[57] Mr. Thayer of Pennsylvania concurred in the views of the previous speakers as to the effect of Section 1.[58] Mr. Boyer of Pennsylvania, a Democrat, also agreed that Section 1 only incorporated the Civil Rights Bill in the Constitution.[59]

Mr. Broomall of Pennsylvania spoke the next day, May 9, and reiterated the view that Section 1 of the amendment incorporated the Civil Rights Bill in the Constitution.[60] Mr. Henry J. Raymond of New York, a conservative or Johnson Republican, who had voted against the Civil Rights Bill because he doubted its constitutionality, stated that Section 1 of the amendment had been before Congress in the Civil Rights Bill.[61] Similarly, Mr. Eldridge, of Wisconsin, and Mr. Eliot, of Massachusetts, expressed the views of the previous speakers on Section 1.[62]

On the last day of debate Mr. Rogers of New Jersey declared that the amendment was no more

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[55] 39th Cong., 1st Sess., p. 2459.
[56] *Id.* at 2461.
[57] *Id.* at 2462.
[58] *Id.* at 2464.
[59] *Id.* at 2465.
[60] *Id.* at 2498.
[61] *Id.* at 2501.
[62] *Id.* at 2506, 2511.

than "an attempt to embody in the Constitution of the United States that outrageous and miserable Civil Rights Bill."[83] Mr. Bingham, who had opposed the Civil Rights Bill, spoke in favor of the amendment, repeating that it was necessary in order for Congress to protect the people from oppressive State laws.[84] Mr. Stevens closed the debate; the previous question was moved and seconded; and, the joint resolution passed the House, 128 yeas, 37 nays.[85] It is thus apparent that nearly all of the members of the House agreed that Section 1 of the proposed amendment incorporated the provisions of the Civil Rights Bill into the Constitution.

The Senate started consideration of the joint resolution on May 23.[86] Senator Howard of Michigan substituted for Senator Fessenden in presenting the measure and made the opening address. With regard to the meaning of the first section he discussed the rights of "citizens of the United States" and the rights in the first eight amendments. He stated:

> ". . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and to compel them at all times to respect these great fundamental guarantees."[87] (Those guarantees he had mentioned earlier, none of which included mixed schools, although separate schools were being main-

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[83] 39th Cong., 1st Sess., p. 2537.
[84] *Id.* at 2541-2544.
[85] *Id.* at 2544-2545.
[86] *Id.* at 2765.
[87] *Id.* at 2766. *Cf. Adamson v. California*, 332 U.S. 46 (1947).

tained both by Congress and the great majority of the States then represented in Congress.)

Mr. Wade proposed an amendment which would have defined "citizens of the United States," his purpose being to assure protection to the Negro in the event the Civil Rights Bill was held unconstitutional.[68] No action was taken by the Senate on the joint resolution from May 24 to May 29, this period being devoted to a caucus of the Republican party. Upon returning to consideration of the resolution on May 29, Senator Howard offered a series of amendments, the first of which added the definition of citizenship which is now the first sentence of the Fourteenth Amendment.[69] Senator Doolittle charged that the first section was intended to validate the Civil Rights Bill and Senator Howard replied that a purpose of the committee was to put the Civil Rights Bill beyond the legislative power.[70]

The final debate started on June 4 with Senator Hendricks remarking about the caucus of the Republican majority.[71] Senator Poland of Vermont stated that Congress by passing the Civil Rights Bill had indicated its feeling toward certain legislation in some Southern States and that this amendment would remove any doubt as to the power of Congress to provide remedial legislation in this regard.[72] Senator Howe of Wisconsin mentioned several rights and

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[68] 39th Cong., 1st Sess., p. 2768.
[69] *Id.* at 2869.
[70] *Id.* at 2896.
[71] *Id.* at 2938.
[72] *Id.* at 2961-2964.

privileges of citizens and cited as an example of law impossible under the amendment, a Florida statute which provided that in addition to being taxed to support the white schools only the Negroes were taxed to support their own schools.[73]

Senator John B. Henderson, of Missouri, indicated by the tenor of his speech that he believed that Section 1 was an attempt to place the Civil Rights Act in the Constitution.[74] The resolution passed the Senate June 8, 1866, 33 yeas, 11 nays.[75]

Summarizing, the legislative intent indicated by the Senate in debate revealed that the understanding of some Senators was that Section 1 incorporated the Civil Rights Bill in the Constitution, and even those who gave the amendment a broader scope thought that it gave Congress power to legislate against discriminatory State legislation. No Senator indicated that it was effective to abolish separate schools; indeed, this was not even hinted.

The House concurred in the Senate amendments to the joint resolution on June 13, 1866.[76] after several short speeches, including one by Mr. Rogers in which he objected to the Constitution being amended as a result of a party caucus.

That the people shared in the belief of the majority of Congressmen as to the effect of Section 1 of the proposed amendment is indicated by a review of the newspapers and political speeches made during the

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[73] 39th Cong., 1st Sess., Appendix 217.
[74] 39th Cong., 1st Sess., pp. 3031-3036.
[75] *Id.* at 3042.
[76] *Id.* at 3148.

period of the adoption of the amendment. The country understood that the Civil Rights Bill was being made a part of the Constitution. Those who gave Section 1 a greater effect thought that it, along with Section 5, vested great legislative powers in the Congress. There was no indication that the amendment would enforce mixed schools.[77] The contemporaneous construction of the amendment by the States, which manifests that same construction, is considered in another portion of this Appendix.[78]

The intent manifested by the Congress, the people, and the States with regard to the Fourteenth Amendment was for the most part that Section 1 made the Civil Rights Bill of 1866 a part of the Constitution. An examination of this Civil Rights Bill reveals, as has been shown in this Appendix, that it covered certain specifically named rights which did not include mixed schools. Actually, it had been amended by its House sponsor, Mr. Wilson of Iowa, to make certain that it did not relate to or require mixed schools. See pages 133 to 139, *supra*. Taking the broadest interpretation given the resolution proposing the Fourteenth Amendment (that in addition to putting the Civil Rights Bill beyond legislative power it made the Bill of Rights applicable to the States), separate schools would still not be made unlawful. Hence, the manifested intent in the adoption of the Fourteenth Amendment was not to deprive the

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[77] Flack, *The Adoption of the Fourteenth Amendment* (1908), pp. 140-160; Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stanford Law Rev. 5 (1949).

[78] See page 194, *infra*.

States of the power to regulate their schools or to require them to have mixed schools. Any other intent would have appeared directly in the Amendment, Congressional debates, or public discussions, because separate schools were then being maintained by the States and the Congress.

4. *Acts of Congress Relating to Separate Schools in the District of Columbia*

During the consideration of the resolution proposing the Fourteenth Amendment (February through June, 1866) and immediately thereafter, the Congress enacted legislation furthering the separate schools it had previously established in the District of Columbia for white and Negro students.

On May 21, 1866, during the time that the Congress was debating the Fourteenth Amendment, the Senate passed a bill to donate real estate in the District of Columbia for Negro schools.[79] The Act, which became effective July 28, 1866, provided that

> "The Commissioner of public buildings . . . is hereby authorized and required to grant . . . to the trustees of colored schools for the cities of Washington and Georgetown . . . *for the sole use of schools for colored children* in said District of Columbia . . . lots 1, 2, and 18 in square 985 in . . . Washington, said lots having been designated and set apart by the Secretary of the Interior to be used for colored schools. . . ."[80]

[79] 39th Cong., 1st Sess., p. 2719. The bill (S. No. 247) had been introduced on April 4 (*id.* at 1753), and reported from Committee on May 2 (*id.* at 2331).

[80] 14 Stat. 343 (1866).

Similarly between April, 1866, and July 23, 1866, the Congress considered and enacted a bill changing the tax support for separate Negro schools in the District of Columbia.[81] It amended the Act of June 25, 1864, so as to require the cities of Washington and Georgetown

> "to pay over to the trustees of colored schools of said cities such a proportionate part of all monies received or expended for school or educational purposes . . . as the colored children . . . in the respective cities bear to the whole number of children, white and colored. . . ."

On March 16, 1867, Senator Sumner of Massachusetts proposed an amendment to a reconstruction bill making it a prerequisite to seating in Congress of Southern Congressmen that:

> "The Constitution shall require the Legislature to establish and sustain a system of public schools open to all, without distinction of race or color."

The amendment was defeated "to his bitter disappointment."[82]

Again on July 11, 1867, Sumner unsuccessfully attempted to amend a Reconstruction Act to require mixed schools.[83]

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[81] This bill, S. No. 246, was introduced April 4, passed the Senate May 21, passed the House July 18, and was approved by the President July 23, 1866. 39th Cong., 1st Sess., pp. 1753, 2719, 3906. 14 Stat. 216 (1866).

[82] Storey, *Charles Sumner*, American Statesmen, Vol. 30, p. 334; 40th Cong., 1st Sess., p. 170.

[83] *Works of Charles Sumner*, Vol. 11, pp. 397-401; Pierce, *Memoirs and Letters of Charles Sumner* (1893), pp. 316-317.

C. The Period Immediately Following the Adoption of the Fourteenth Amendment in 1868.

1. *Acts of Congress Relating to Separate Schools in the District of Columbia*

Soon after the adoption by the States of the Fourteenth Amendment the Congress enacted a bill transferring the duties of the Negro trustees of the Negro schools of Washington and Georgetown, D. C., to the (white) trustees of the public schools of those cities. It left the schools separate for white and Negro students. The bill passed the Senate July 10, 1868, and the House on February 5, 1869.[84] Its passage greatly disturbed the Negro citizens who wanted control of their schools left with Negro trustees. Several Negro meetings were held and resolutions adopted by them condemning the bill for removing the control of the Negro schools from the Negro trustees. So on February 13, 1869, President Johnson vetoed the bill because he said no good reason was shown why the Negro board should be abolished. The veto was not overridden.[85]

In February, 1871, the question of whether mixed or separate schools would be maintained in the District of Columbia was again thoroughly discussed.

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[84] 40th Cong., 2nd Sess., p. 3900; 40th Cong., 3rd Sess., p. 918 (S. No. 609).

[85] 40th Cong., 3rd Sess., p. 1164; Special Report of Commissioner of Education 1871, p. 260; H. R. Exec. Doc. No. 315, 41st Cong., 2nd Sess. (1869-1870); Ingle, *The Negro in the District of Columbia*, Johns Hopkins University Studies, 11th Series, p. 28 (1893).

Senate Bill 1244, to reorganize the school system of the District, was proposed. Ingle summarized the move in this way:

> "It was at this time . . . that the question of mixed schools was incontinently agitated, culminating in a debate in Congress in . . . 1871, in which the effort was unsuccessfully made to remove all restrictions on account of color from all the public schools . . ."[86]

The Committee on the District of Columbia had amended Section 6 of the bill to provide that

> "No distinction on account of race, color, or previous condition of servitude shall be made in the admission of pupils to any of the schools . . . or in the mode of education or treatment of pupils in the schools."[87]

Senator Patterson of New Hampshire moved to strike out the above words. He thought mixed schools would destroy the public schools of the city. He pointed out that "the Law of the District of Columbia as it now stands enforces a separation of whites and blacks in the schools." He felt that to mix the common schools would greatly injure Negro education because white withdrawal from the schools would cause a loss of support for public schools. "This bill (with the clause omitted) is precisely like the law as it stands in our Northern States . . . (it)

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[86] Ingle, *The Negro in the District of Columbia*, Johns Hopkins University Studies, 11th Series, p. 29 (1893).

[87] 41st Cong., 3rd Sess., pp. 1053-4.

simply leaves it to the board of education to determine for themselves whether they will mix the whites and blacks or have separate schools. . . ."[88]

Senator Thurman of Ohio said the common schools were having enough difficulties without saddling the system with a compulsory mixing of the races. He thought the Government should not force sociological ideas on people; that communities should be left to choose separate or mixed schools for themselves.[89]

Senator Tipton of Nebraska said that in his community there were only two or three Negro students; they were taken in and separated within the school building. But if there had been sufficient Negroes, separate schools would have been established.[90]

Senator Revels, a Negro Republican of Mississippi, Senator Sawyer of South Carolina, and Senator Wilson of Massachusetts advocated mixed schools.[91]

Senator Hill of Georgia moved to amend Patterson's amendment to read that no distinction should be made in providing *the means or mode* of education of white and Negro pupils.

The bill did not pass, and the schools of the District remained as they had been from the beginning, with separate schools for white and Negro students.

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[88] 41st Cong., 3rd Sess., pp. 1054-1057.

[89] *Id.* at 1057.

[90] *Id.* at 1059.

[91] *Id.* at 1059-1061.

2. *The First and Second Enforcement Acts, 1870 and 1871*

On May 30, 1870, "The Enforcement Act of 1870" was enacted. It dealt with the right of the Negro to vote and to the protection of that right. It also reenacted in Section 18 the Civil Rights Act of 1866. It added in Section 17 that if different punishment were administered to any person because of race, it would constitute a misdemeanor.[92] It is significant to note that after the adoption of the Fourteenth Amendment, Congress did not enlarge on the rights enumerated in the Civil Rights Act of 1866. It simply reenacted that Act.

On February 28, 1871, the Second Enforcement Act was passed.[93] It dealt wholly with elections and voting rights.

On October 24, 1871, a letter of Charles Sumner addressed to a national Negro convention in Columbia, S. C., was read there. In it Sumner recognized

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[92] 16 Stat. 140 (1870); 41st Cong., 2nd Sess., p. 3480; McPherson, *Political History of the U. S.* (2d ed. 1875), p. 546. The first 11 sections dealt with Negro suffrage. Other sections dealt with penalties for interfering with the voting. Sections 19-23 dealt with elections. See Fleming, *Documentary History of Reconstruction*, Vol. II, p. 102. During this period, also, Senator Sumner introduced several "Supplementary Civil Rights Bills"; *e. g.*, S. R. 916, May 13, 1870; Jan. 20, 1871, reported adversely by Committee. 41st Cong., 3rd Sess., pp. 619, 1263; March 9, 1871, 42nd Cong., 1st Sess., p. 21. They were not enacted.

[93] 41st Cong., 3rd Sess., p. 45, amending the First Enforcement Act of May 31, 1870; discussed Annual Cyclopedia 1871, pp. 148, 153.

and said that mixed schools were *not* required and that the Civil Rights Act needed amendment in that regard. The letter read in part:

> "The right to vote will have new security when your equal right in public conveyances, hotels, and common schools is at last established; but here you must insist for yourselves by speech, petition, and by vote. Help yourselves, and others will help you also. The Civil Rights law needs a supplement to cover such cases. This defect has been apparent from the beginning; and, for a long time I have striven to remove it."[94]

In January, 1872, Sumner again urged his civil rights bill, saying to the Senate that: "Without the amendment the original law is imperfect."[95]

3. *The Unsuccessful Attempt to Enact Forced Mixed Schools as Part of a Civil Rights Amendment to The General Amnesty Bill.*

In December, 1871 and in 1872 a sustained attempt was made to enact a civil rights bill, including a provision for mixed schools, by amendment to an amnesty bill removing legal and political disabilities imposed by the third section of the Fourteenth Amendment. The amnesty bill required a two-thirds majority to pass while the civil rights bill, by itself, required only a simple majority. Sumner was suc-

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[94] Annual Cyclopedia 1871 (Appleton & Co. 1872), Vol. 11, pp. 752-753.

[95] 42nd Cong., 2nd Sess., p. 383, January 15, 1872.

cessful on two occasions in getting his civil rights bill adopted as an amendment to the amnesty bill in the Senate. But the amnesty bill, on which the civil rights bill then depended, failed to get two-thirds majority and failed to pass the Senate as thus amended. Finally, the Sumner civil rights bill, as a separate measure, was amended by deleting the reference to schools and churches and was passed by the Senate. The amnesty bill then passed. But the Sumners bill was not passed by the House.

A brief reference to the debates will emphasize that the matter of mixed schools was thoroughly discussed and that a majority of the Congress recognized that mixed schools were not required by the Fourteenth Amendment, and that the majority of Congress did not favor Congressional action which would attempt to abolish separate schools.

On December 20, 1871, the Senate took up the Amnesty bill. Sumner moved to amend it with his Civil Rights Bill which provided:

> "That all citizens . . . without distinction of race . . . are entitled to the equal and impartial enjoyment of accommodations, advantages, facilities or privileges furnished by common carriers . . . innkeepers . . . theaters . . . common schools . . . church organizations . . . cemetery associations . . . and this right shall not be denied or abridged on any pretence of race . . ."

It further provided that wherever the word "white" appeared in a statute with reference to race,

the statute was thereby repealed."[96] This amendment was defeated in the Senate 29 to 30.

On January 15, 1872, the amnesty bill was again brought up in the Senate and Sumner again offered his bill as an amendment.[97] He spoke vigorously for his amendment including arguments in favor of compulsory mixed schools.[98] Vickers of Maryland and others thought the civil rights bill unconstitutional.[99] Frelinghuysen of New Jersey moved to amend by providing "that churches, schools, cemeteries . . . . exclusively for either the white or colored race, should not be taken from the control of those establishing them, but shall remain devoted to their use."[100] Sumner accepted the amendment.[101] There were many speeches for the Sumner amendment.[102] and many against it.[103] Much of the opposi-

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[96] Annual Cyclopedia 1872 (Appleton), pp. 143-144. See also 42nd Cong., 2nd Sess., p. 381. Sumner was reminded that Congress could not repeal a State law.

[97] 42nd Cong., 2nd Sess., p. 381.

[98] *Id.* at 381-384; 434; 726; 822.

[99] *Id.* at 386; others of the same view included Thurman of Ohio (p. 525); Morrill of Maine, who had been in the 39th Congress (p. 730 and Appendix, p. 1); Carpenter of Wisconsin (p. 759); Davis of Kentucky, who had also been in the 39th Congress (p. 763). This Court declared the Sumner bill which was enacted in 1875 (the references to schools and churches having been deleted) unconstitutional. *Civil Rights Cases*, 109 U.S. 3 (1883).

[100] *Id.* at 435, 487.

[101] 42nd Cong., 2nd Sess., p. 453.

[102] *E. g.*, Sawyer of South Carolina. (p. 488); Morton of Indiana (p. 522); Flanagan, a Reconstruction Republican of Texas (p. 585); Wilson of Massachusetts (p. 819).

[103] *E. g.*, Hill of Georgia (p. 492); Morrill of Maine (appendix, p. 4); Davis of Kentucky (p. 763); Stevenson of Kentucky (p. 912).

tion to the bill was centered on the mixed school provision. For example, Saulsbury of Delaware thought it would definitely injure the common schools.[104] Thurman of Ohio didn't think Congress could require mixed schools.[105] Ferry of Connecticut said,

> "With regard to . . . schools and churches, I clearly am of the opinion that the Federal Government ought not to interfere."[106]

His motion to strike out the reference to churches was agreed to.[107]

On the question of accepting the Sumner amendment to the amnesty bill, the vote in the Senate was tied and Vice President Colfax voted in favor of the amendment.[108] But the amnesty bill as thus amended failed to pass on February 9, 1872.[109]

The matter was again debated in the Senate in May, 1872, The Senate took up the amnesty bill which had passed the House. Again Sumner proposed his Civil Rights Bill as an amendment. And again there were extended debates for[110] and against[111] the Sumner amendment.

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[104] 42nd Cong., 2nd Sess., Appendix, p. 7.

[105] 42nd Cong., 2nd Sess., Appendix, pp. 25-27. See also Flack, *The Adoption of the Fourteenth Amendment*, p. 255.

[106] 42nd Cong., 2nd Sess., p. 893.

[107] *Id.* at 896.

[108] *Id.* at 919.

[109] *Id.* at 928.

[110] Edmunds of Vermont (p. 3190).

[111] Trumbull (p. 3189); Boreman (p. 3195).

Senator Trumbull of Illinois, who had introduced the Civil Rights Act of 1866 and the First Supplemental Freedmen's Bureau Bill in the 39th Congress, said "The right to go to school is not a civil right and never was . . . it is a privilege."[112] Senator Ferry of Connecticut said that in the Northern states and in the District of Columbia students were separated by race and by sex and given equal advantages.[113]

Again the mixed school provision was a center of heated debate. Boreman of West Virginia said that the common schools in his State would be severely handicapped by forced mixed schools.[114] Blair of Missouri thought it would be good policy to separate the races.[115]

Ferry of Connecticut moved to delete the reference to mixed schools.[116] He said:

> ". . . in the community where I reside there is no objection to mixed schools . . . and if I were called upon to vote *there*, I should vote for them. It would be a useless expense to establish separate schools for the few colored people in that community. But I cannot judge other communities by that community. . . . I believe the Senator's bill relating to the District of Columbia, for instance, would utterly destroy the school system in this District. . . .
>
> "Take for instance the State of Ohio where I understand the law permits the districts to have

[112] 42nd Cong., 2nd Sess., p. 3189.
[113] *Id.* at 3190.
[114] 42nd Cong., 2nd Sess., p. 3195.
[115] *Id.* at 3251.
[116] *Id.* at 3256.

> mixed or separated schools . . . and I observe a decision of the Supreme Court of Ohio reported in yesterday's newspaper . . . It had (there) been the assertion . . . . that compelling the separation of the races into different buildings was a violation of the 14th amendment, notwithstanding that both races . . . enjoyed the same or equal privileges. . . . that Court . . . of judges whose political opinions are like those of the majority of this body, . . . 'sustained the constitutionality . . . of the common school laws . . . and held that the organization of separate schools for colored children is not in conflict with the provisions of the fourteenth amendment.' I believe that that decision is good law."[117]

His amendment was defeated[118] although his proposal was later adopted in another amendment, as hereinafter related. Senator Blair's amendment to allow each city, county, or state to decide at an election whether to have separate schools was defeated.[119]

Continuing the debate, Senator Casserly of California spoke vigorously against mixed schools. He referred to the decision of the Massachusetts Court in *Roberts v. City of Boston* upholding the constitutionality of separate schools in the light of the wording of the Massachusetts Bill of Rights which was similar to the words of the Fourteenth Amendment.[120]

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[117] 42nd Cong., 2nd Sess., p. 3257, May 9, 1872. The case referred to is *State v. McCann*, 21 Ohio St. 198.
v. McCann, 21 Ohio St. 198.

[118] *Id.* at 3285, May 9, 1872.

[119] *Id.* at 3258, 3262.

[120] *Id.* at 3261.

Again the vote on Sumner's amendments to the amnesty bill was tied 28 to 28, and the Vice President voted in its favor. And again the main bill, the amnesty bill, was defeated on May 10, 1872.[121]

On May 21, 1872, the Senate took up the Sumner Civil Rights Bill as a separate measure. This time, the motion of Senator Carpenter of Wisconsin to amend the bill by deleting the reference to public schools, churches, cemeteries, and juries was adopted.[122] In this form the Civil Rights Bill passed the Senate.[123]

Mr. James G. Blaine of Maine, later Speaker of the House of Representatives, in his book *Twenty Years of Congress* (1886) says this concerning Senator Sumner, who was absent when his bill passed with the reference to schools and churches omitted:

> "The Amnesty Bill was immediately taken up; while it was pending Mr. Sumner returned and warmly denounced the fundamental change that had been made in the Civil Rights Bill . . . Mr. Sumner's denunciations of the emasculated Civil Rights Bill were extremely severe; *but he was pertinently reminded by Senator Anthony of Rhode Island that the bill was all that could be obtained in the Senate at this session*, and perhaps more than could be enacted into law. *The senator from Rhode Island had correctly estimated the probable action of the House . . .*" (p. 514.)

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[121] 42nd Cong., 2nd Sess., p. 3270.

[122] *Id.* at 3734, 3735. See also Pierce on *Charles Sumner*, p. 503 and Moorfield Storey on *Charles Sumner*, p. 405.

[123] *Id.* at 3736.

4. *Debates on the Federal Aid to Education Bill*

A majority of the members of the House, many of whom had been in Congress when the Fourteenth Amendment was adopted, again showed that they did not think the Fourteenth Amendment required mixed schools. On January 15, 1872, H. R. 1043 was reported out of committee. It proposed to give financial aid to education in the States out of receipts of public land sales.[124] The bill was silent as to separate or mixed schools, but some members feared that it might be construed to require mixed schools.[125] So on February 8, 1872, Mr. Hereford of West Virginia offered an amendment providing

> "That no moneys belonging to any State . . . under this act shall be withheld . . . for the reason that the laws thereof provide for separate schools for white and black children or refuse to organize a system of mixed schools."

The amendment was adopted 115 to 81.[126] The bill as amended passed the House[127] and was brought out of committee in the Senate.[128] But it was not called up for debate in the Senate during the session.[129] The

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[124] 42nd Cong., 2nd Sess., p. 396.

[125] Representatives Storm, Kerr, and Harris; *id.* at 569, 791, 855.

[126] 42nd Cong., 2nd Sess., p. 882.

[127] *Id.* at 903.

[128] 42nd Cong., 3rd Sess., p. 869.

[129] This bill was unsuccessfully urged in the 43rd Congress, 1st Session (December 1873), pp. 104, 149.

subsequent history of this act (never passed) is set out in the footnotes. The policy of Congress as to separate schools has not changed.[130]

5. *Sumner's Attempt to Force Mixed Schools in the District*

During the same period, Senator Sumner attempted unsuccessfully to pass through the Senate a bill to require mixed schools in the District of Columbia. Reported from committee in April, 1872,[131] the bill proposed to abolish the separate schools and separate school funds created by act of July 11, 1862, and subsequent acts. Senator Stock-

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[130] The bill as introduced in the 43rd Congress, was silent as to separate schools, leaving that decision for local districts. Kasson of Iowa spoke against Federal interference in local education (43rd Cong., 1st Sess., p. 468). Butler of Tennessee said it wouldn't interfere (p. 490). Cox of New York made a blistering speech against mixed schools and said this bill was just an entering wedge (p. 612). The bill was before the 44th Congress, 1st Session, 1876 (p. 1767); the 45th Congress, 2nd Session, 1878 (pp. 4119 and 3834); and the 46th Congress, 2nd Session, 1879-80 (pp. 309, 109, 1495).

The bill as reported from committee of the House of the 47th Congress (1882) contained a provision that funds would not be withheld because of the operation of separate schools. (47th Cong., 1st Sess., p. 3839). Again containing authorization for expenditure in separate schools, the bill passed the Senate at the 50th Congress (p. 1223), but did not pass the House. During the first session of the present Congress, the amendment of Senator Lodge to deny funds to States having separate schools was defeated. 81st Cong., 1st Sess., p. 5593, May 3, 1949.

[131] 42nd Cong., 2nd Sess., p. 2484; S. B. 365 "to secure equal rights in the public schools of Washington and Georgetown."

ton of New Jersey argued that what Sumner wanted was not equal rights (for the Negro schools in the District were equal, he said) but forced intermingling of the races. He said:

> "I think in the condition the two races are before the law . . . we are bound to legislate on all subjects . . . with equality toward them. But when you leave the appropriate subjects of legislation and tell me . . . (where) my children shall go to school, when you attempt really an enforced system of education, you are then treading on the bounds of that civil liberty which our ancestors came to this country to establish."[132]

Senator Bayard of Maryland said he saw no necessity for the bill and that he had not been shown that the people of the District wanted the bill.[133] Senator Ferry of Connecticut offered an amendment which would have called for an election for the people of the District to determine whether or not they wanted mixed schools. He thought to force mixed schools on them would be tyrannical.[134] Senator Edmunds of Vermont said that,

> "It is a matter of great importance that we should determine fairly and squarely whether in the District of Columbia, where we have the power, that we will exercise it in the protection of equal rights. . . ."[135]

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[132] 42nd Cong., 2nd Sess., p. 2540.
[133] *Id.* at 2541.
[134] *Id.* at 3124, 3125. May 7, 1872.
[135] *Id.* at 3123.

The matter died in the Senate on May 8, 1872, clearly indicating again that the Senate did not think that the policy of the Fourteenth Amendment required mixed schools.

D. Action and Debates on the Civil Rights Bill of 1875, from the Operation of Which Public Schools Were Excepted.

While Mr. Sumner had been unsuccessfully urging his Civil Rights Bill for many years, a portion of a similar bill was enacted in 1875, after the reference to public schools was omitted. This is the Act the first section of which was declared unconstitutional in the *Civil Rights Cases*, 109 U.S. 3. The debates and action on these bills (H. R. 796 and S. No. 1) clearly show that a majority of the Congress did not think that the Fourteenth Amendment required mixed schools.

1. *In the House of Representatives 43rd Congress, 1st Session, 1873-1874*

As introduced into the House of Representatives of the 43rd Congress in December, 1873, the bill (H. R. 796) provided:

> "That whoever, being . . . in charge of any public inn . . . public amusement . . . stage-coach, railroad . . . cemetery or other benevolent institution, or any public school supported . . . at public expense . . . shall make any distinction as to admission or accommodation therein, of any citizen of the United States be-

cause of race, color . . . shall be fined not less than one hundred dollars nor more than five thousand dollars . . ."[136]

The bill was debated at great length; and, in the interest of brevity, all of the speeches cannot be referred to. The mixed school provision was again one of the main points of division.

The bill was sponsored by Rep. Butler of Massachusetts. He and others of the Massachusetts delegation at first insisted on the mixed school provision.[137] They were joined by Negro representatives of the then governments of some of the Southern States.[138] It was pointed out that mixed schools had worked well in Massachusetts. Other representatives of some of the Northern States spoke for the bill including the provisions for mixed schools.[139]

But the bill received strong opposition, particularly the provision requiring mixed schools. Almost all of those who spoke against the bill pointed out its unconstitutionality. Rep. Hamilton of New Jersey thought it an unauthorized usurpation of the Federal Government for it to attempt to regulate the schools of New Jersey.[140] The Southern representatives (except the Negro representatives and a Republican of Florida, Mr. Purman) were of the opin-

[136] 43rd Cong., 1st Sess., p. 378, Dec. 19, 1873. See Flack, *op. cit. supra*, pp. 318, 322; 260-264.

[137] *Id.* at 340; Rep. Dawes, p. 342.

[138] Rainey of South Carolina, p. 343; Ransier of South Carolina, p. 382, 407, 1311; Elliott of South Carolina, pp. 407-410; Cain of South Carolina, pp. 566, 901; Walls of Florida, p. 417.

[139] Frye of Maine, *id.* at 375; Lawrence of Ohio, pp. 412-415; Monroe of Ohio, p. 414.

[140] *Id.* at 740.

ion that to force mixed schools would cause the abandonment or ruin of public schools in their district; would deprive poor white citizens, who could not afford private schools, of an education; would deprive the Negro of a good public education because white support, which furnished practically all the tax money, would be withdrawn from the public schools; and, in short, would mean the end of public education in that region.[141]

On the question of constitutionality, frequent references were made to the *Slaughter House Cases* where the distinction was pointed out between a person's rights (1) as a citizen of the United States, and (2) as a citizen of a State. A free school education at the State's expense was not a right of "a citizen of the United States," but a "privilege" of a citizen of a State.[142]

Representative Mills of Texas made a scholarly argument as to the meaning of the Fourteenth Amendment:[143]

> "It was for the reason given by the committee that the 14th amendment was adopted, not to

[141] Beck and Durham of Kentucky, pp. 342, 406; Harris and Whitehead of Virginia, pp. 375, 427; Buckner of Missouri, p. 427; Stephens, Blount, and Harris of Georgia, pp. 381, 410, 725; Roger Q. Mills and Herndon of Texas, pp. 383, 419; Bright and Atkins of Tennessee, pp. 414, 453. (All references are to pages in the Congressional Record, 43rd Congress, 1st Session.)

[142] *E. g.*, Herndon of Texas, p. 421; Buckner of Missouri, pp. 428, 429; Atkins of Tennessee, pp. 414, 453; Stevens of Georgia, p. 378; Durham of Kentucky, p. 406; Harris of Virginia, p. 376.

[143] 43rd Cong., 1st Sess., pp. 384-386. The speech is noted in Flack, *The Adoption of the Fourteenth Amendment*, p. 261.

enlarge the privileges and immunities already conferred, but simply to prohibit the states from abridging them as they existed. . . . These words have been again and again subjected to the most learned critical investigation. They have been construed by the judicial . . . the legislative . . . and by the executive department, and the interpretation has always been the same. If there is any virtue in the rule *stare decisis* . . . I hold that all the departments of government should stand decided and refuse to go behind the interpretation of these words, so universally acknowledged, and disturb the decision when the rights of millions hang upon it. . . .

"From the authority of adjudged cases it is clear that the privileges and immunities mentioned in the fourteenth amendment are only such as are conferred by the Constitution itself as the supreme law over all . . . .

"The States have always exercised the right to fix the status of their citizens, and they will continue to do so. It is their own unquestioned right to make and unmake their constitutions and laws for the government of their people; to establish universities, colleges, academies, and common schools, and govern them according to their own pleasure; to prescribe who may be admitted to share their bounty and on what conditions.

"The great evil this bill has in store for the black man is found in the destruction of the common schools of the South. His children have been enjoying all the benefits of liberal education, paid for by the white people of the South. . . .

"We all in the South know that the white people and black before the war belonged to the

same churches, often had the same pastors; but now of their own volition they have separated everywhere from the white people, and have their own bishops and ministers and churches and congregations—all separate from the white people. . . ."

Representative Harris of Virginia said:

> "Our constitution, adopted by what was known as the Underwood convention, composed of Republicans, provided that we should inaugurate the free-school system by 1877. But a conservative legislature in 1870, at its first meeting, inaugurated the separate school system. . . . The passage of the civil-rights bill . . . would immediately wipe out, or practically destroy, the public school system of Virginia."[144]

Representative Durham of Kentucky said, ". . . the most objectionable part of this bill is that which forces the children of the freedmen into our common schools."[145]

Numerous amendments were offered to the bill including an amendment stating that separate schools might be maintained for the races.[146] Apparently convinced that his bill could not pass, Representative Butler of Massachusetts moved to recommit his bill to Committee to consider the amendments pro-

[144] 43rd Cong., 1st Sess., pp. 376, 377.

[145] *Id.* at 406. These same sentiments were expressed by many of the Representatives. *Id.* at 415, 419, 421, 427, 429.

[146] *Id.* at 407.

posed. He was impressed with the arguments as to mixed schools. On this matter he said,

> "But there are reasons why I think this question of mixed schools should be carefully considered. The Negroes . . . have never, until the last few years, had an opportunity for education. . . . Therefore in the Negro schools which I established as a military commander during the war, I found that while I had plenty of school boys with 'shining morning faces,' there were none 'creeping unwillingly to school.' . . . *And I shall recommit the bill . . . because I want time to consider whether upon the whole it is just to the negro children to put them into mixed schools.* . . .
>
> "And therefore I am quite content to consider this question in the light of what on the whole is best for the white and colored child before this matter is again before the House."[147]

The above indicates that even General Butler of Massachusetts, who was in the 39th Congress which adopted the Fourteenth Amendment, did not really believe that the Fourteenth Amendment would prohibit separate schools. Otherwise he would not have been willing to consider the expediency of the separate school amendment. The bill was recommitted to his Committee on January 7, 1874, and came out on February 3, 1875, amended to allow separate schools.[148]

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[147] 43rd Cong., 2nd Sess., pp. 455-457.

[148] 43rd Cong., 2nd Sess., pp. 900, 1010.

2. *In the Senate, 43rd Congress, 1st Session*

On January 27, 1874, Sumner again introduced his Civil Rights Bill into the Senate. The bill passed the Senate at this session, but did not pass the House of Representatives. The House Bill (H. R. 796) which finally passed the House in 1875, after all reference to schools had been deleted, ultimately passed the Senate in that form and became the Civil Rights Act of 1875.

The Sumner bill proposed that no citizen of the United States should, because of race, be excluded from the full and equal enjoyment of any accommodation or facility furnished by any inn keeper, common carrier, theater, "common schools and other public institution of learning . . ." or cemetery associations; "provided that private schools, cemeteries, and institutions of learning established exclusively for white or colored persons . . . shall remain according to the terms of the original establishment." The bill provided also that no citizen should be disqualified for jury service because of race. Section 5 provided that "every discrimination against any citizen on account of color by the use of the word 'white' . . . in any law, statute, ordinance or regulation, national or State, is hereby repealed and annulled."[149]

Senator Edmunds of Vermont moved that the bill be sent to committee because "in some respects" the bill was too "strong." Senator Stewart of Nevada agreed. Sumner urged immediate passage, but the

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[149] 43rd Cong., 1st Sess., p. 945.

bill was sent to committee. In March, 1874, Senator Sumner died.[150] On April 29, 1874, Senator Frelinghuysen of New Jersey reported Sumner's bill from Committee. The Committee draft of the bill differed from Sumner's draft. The original bill provided that "no citizen should be excluded" from common schools, et cerera, and purported to repeal all state laws containing the word "white" referring to race. The Committee's bill provided that "all persons . . . shall be entitled to full and equal enjoyment of accommodations . . . and privileges of inns, public conveyances, . . . theaters . . . common schools . . . cemeteries . . . subject only to the conditions and limitations established by law, and applicable alike to citizens of every race, . . ." It omitted the reference to private schools and omitted the section purporting to repeal State laws.[151]

Asked if it was a denial of equal rights to have separate schools, Senator Frelinghuysen of New Jersey discussed two cases: *State v. McCann* by the Supreme Court of Ohio holding separate schools constitutional under the then recently adopted Fourteenth Amendment, and *Clark v. Board of Directors*, by the Iowa Court striking down separate schools under the provisions of the *Iowa* Constitution (not the Federal Constitution). He pointed out that the cases were distinguishable because of different constitutional provisions of the States. He further conceded that it was not a privilege of a "citizen of the United States" to have an education at a State's

[150] Blaine, *Twenty Years in Congress*, p. 544.

[151] 43rd Cong., 1st Sess., p. 3451.

expense. He nevertheless said the object of this bill was to prohibit the exclusion of anyone from a school because of race.[152]

The bill was taken up again in May, 1874 and passed the Senate after an all-night session. There were many speeches for the bill[153] and against it, particularly on the question of mixed schools.[154]

Senator Stockton of New Jersey argued that the regulation of public schools was a matter of State concern only. He said the Legislature of New Jersey would not pass a compulsory mixed school law: "They know their constituents do not desire it. They know it is not right." He said that Negroes were entitled to "equal" rights; but "equal" rights did not mean "the same" facilities. He referred to the equal, separate schools in the District of Columbia, saying that Negroes and whites had equal rights when they had equal separate schools. He said the Fourteenth Amendment did not purport to tell a local community whether it should organize a school district, pay taxes to support it, and whether it would divide its students by age, sex, or race.[155]

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[152] 43rd Cong., 1st Sess., p. 3452.

[153] Alcorn of Mississippi (except the provision for forced mixed schools), Appendix, p. 305; Pease of Mississippi, p. 4153; Edmunds of Vermont, p. 4171; Boutwell of Massachusetts (except that he wanted to except separate white and Negro schools previously established), p. 4169; Frelinghuysen of New Jersey, p. 3452.

[154] Stockton of New Jersey, pp. 4117, 4144-4146; Bogy of Missouri, Appendix, pp. 318-323; Saulsbury of Delaware, p. 4159; Sargent of California, pp. 4167, 4175; Stewart of Nevada, p. 4167; Gordon of Georgia, p. 4169; Johnston of Virginia, p. 4114; Cooper of Tennessee, p. 4155.

[155] 43rd Cong., 1st Sess., pp. 4144-4146. This argument is referred to in Flack, *The Adoption of the Fourteenth Amendment*, p. 268.

Senator Howe of Wisconsin thought the first and fifth sections of the Fourteenth Amendment were broad enough to support Congressional legislation. He said, "Let justice be done though the common schools and the very heavens fall."[156]

Senator Alcorn of Mississippi had a novel approach. He said that the Negroes were in control of his State and so "self protection, if I had no higher consideration, would move me to support . . . this bill . . . I declare myself in favor of that policy which the colored man declares as necessary." But as to mixed schools he said,

> "You say that you do not want the schools mixed. Well, I am not in favor of mixing them; and I consider that this bill does not mix them. . . . How is it in my State? There . . . the colored people control; they make the laws; they levy the taxes; they appoint the school board. The whole machinery is in their hands; yet there is not a mixed school in the State . . . and we have civil rights there. Why is it? Simply because the colored people do not desire it; because they believe the interests of both races will be promoted by keeping the schools separate."[157]

Senator Saulsbury of Delaware, who had been a Senator in the 39th Congress which proposed the Fourteenth Amendment, said that the Fourteenth Amendment did not remove the State's police power

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[156] 43rd Cong., 1st Sess., pp. 4147-4152.

[157] *Id.* at Appendix, p. 305.

to have separate schools. He read from the opinion of Mr. Justice Field of this Court in *Bartemeyer v. Iowa:*

> "No one has ever pretended . . . that the 14th amendment interferes in any respect with the police power of the State. Certainly no one who desires to give to that amendment its legitimate operation has ever asserted for it any such effect. It was not adopted for any such purpose. The judges who dissented from the opinion of the majority of the Court in the Slaughter-House Case never contended for any such position. But on the contrary, they recognized the power of the State in its fullest extent. . . ."[158]

He referred to separate schools in Maryland and Delaware as being best for both races, and said that to force mixed schools would destroy the common schools. In fact, he said, ". . . I say that, sooner than see mixed schools in the State of Delaware, I would be glad to see the Legislature destroy the common school system in the State."[159]

Senator Stewart of Nevada, who was also in the 39th Congress, said he thought Congress had the power to legislate. But it is evident that he did not believe the Fourteenth Amendment required mixed schools because he argued against that provision:

> "If by voting for mixed schools I thought I could accomplish that purpose (educating the Negro) . . . I would vote for them; but I am

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[158] 43rd Cong., 1st Sess.; p. 4159, May 22, 1874; 18 Wall. 129, 138 (1873).

[159] *Id.* at 4157-4162.

> afraid they would not have that precise effect. Consequently I think it ought to be left optional to have schools mixed or separate as the people themselves desire. I do not think at all events we should take the step to compel mixed schools."

He said he thought the Constitution should be amended to require the States to maintain common schools (and he had offered the amendment twice). "But while it is left to the States to have systems of free schools or not, and while the several States are wavering in the balance . . . I say it is endangering, in many of the States the education of the present generation. . . ."[160]

Senator Stewart of Nevada said that the Senator from Massachusetts (Boutwell) was thinking of the 800,000 Negro votes, and he rejoiced with him that the Republican party had them. But he said, "No political consideration can make me vote in a manner which I fear will deny to any child the right to be educated."[161]

Senator Sargent of California said that the Fourteenth Amendment did not prohibit mixed schools any more than it prohibited the separation of boys and girls."[162]

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[160] 43rd Cong., 1st Sess., p. 4167.

[161] *Id.* at 4169. Boutwell of Massachusetts foresaw the Negro voting Republican out of gratitude, p. 4115. Flack, in his *Adoption of the Fourteenth Amendment*, observed that the "prime motive of a majority of those who voted for the bill was political. . . ." p. 271.

[162] *Id.* at 4172, 4175.

The advocates of the bill were successful in defeating amendments to the bill. Senator Boutwell of Massachusetts, who had been in the 39th Congress, wanted to amend the bill to except common schools or other institutions of learning theretofore established from the operation of the bill.[163] Senator Thurman of Ohio wanted the $500 fine payable to the person whose civil rights were offended.[164] Senator Gordon of Georgia moved to omit the reference to common schools.[165] (It will be remembered that the bill as finally enacted at the next session did delete the reference to common schools.)[166] Other amendments as to the enforcement of the Act, not material here, were also rejected.[167] The bill was passed by the Senate on May 22, 1874.[168]

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[163] 43rd Cong., 1st Sess., p. 4115. His amendment would make the bill read: "And also of every common school . . . that *may hereafter* be endowed by any State or supported in whole or in part by public taxation." His amendment was defeated, p. 4169. He was particularly anxious about schools of a private nature which were supported in part by the State.

[164] Defeated, p. 4170.

[165] 43rd Cong., 2nd Sess., pp. 1010, 1011 in the House; *id.* at 1870 in the Senate.

[166] 43rd Cong., 1st Sess., pp. 4170-4171; 4175.

[167] *Id.* at 4176. As passed, Section 1 of the bill read: "That all citizens and other persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; and also of common schools and public institutions of learning or benevolence supported, in whole or in part, by general taxation, and of cemeteries so supported, and also the institutions known as agricultural colleges endowed by the United States, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Section 4 of the bill prohibited exclusion from jury service because of race.

3. *In the 43rd Congress, 2nd Session, 1875*

The House of Representatives had returned H. R. 796 to committee at the close of the first session of the 43rd Congress. On February 1, 1875, Mr. Butler of Massachusetts was successful in getting the bill considered again.[169] The bill as reported by Committee was amended specifically authorizing separate schools.[170] Apparently the Committee, of which Butler was chairman, felt that Congress should affirmatively make separate schools an exception to the Civil Rights Act. Others, as will be shown in the amendment proposed by White of Alabama, thought the bill should go further and also affirmatively allow, separate accommodations in inns and on public transportation. Others thought (Rep. Cessna) that the wording of the Senate's bill by Mr. Sumner, requiring mixed schools, should be substituted. Still others, (Kellogg) thought that the Congress should enact the bill as to its other provisions and just not legislate as to schools, thus leaving the matter to the individual States. This latter view was ultimately adopted.

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[169] The rules of the House were amended in order to get the bill brought up. 43rd Cong., 2nd Sess., pp. 900-902. Butler had reported the bill on December 16, 1874, but it was again recommitted (*id.* at 116). On January 25, 1875, he attempted to bring the bill up again but failed to get the necessary two-thirds vote (*id.* at 704).

[170] Flack, *The Adoption of the Fourteenth Amendment* at page 272 says that the bill was almost identical with the one passed by the Senate. In most respects, his statement is correct. But it is erroneous as to the school provision.

The Committee after the reference to common schools in the bill added the following:

> "Provided, That if any State or the proper authorities in any State, having the control of common schools or other public institutions of learning aforesaid, shall establish and maintain separate schools and institutions, giving equal educational advantages in all respects for different classes of persons entitled to attend such schools and institutions, such schools and institutions shall be a sufficient compliance with the provisions of this section so far as they relate to schools and institutions of learning."[171]

The following amendments were offered (and they will hereafter be referred to by the name of the Representative proposing the amendment):

1. *White* of Alabama: to add the following proviso:

   "Provided that nothing in this act shall be construed to require mixed accommodations, (by sitting together) facilities, and privileges at inns, in public conveyances . . . theaters, . . . for persons of different race or color, nor to prohibit separate accommodations, facilities and privileges at inns, in public conveyances . . . theaters . . . And provided further that nothing in this act shall be construed to require mixed common schools . . ."[172]
2. *Cessna* of Pennsylvania moved to substitute the words of the Senate bill.[173]

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[171] 43rd Cong., 2nd Sess., p. 1010.
[172] *Id.* at 939.
[173] *Id.* at 938; defeated p. 1011.

3. *Kellogg* of Connecticut moved to strike out the words of the original bill as to schools and also the proviso added by the House Judiciary Committee; *i. e.*, to pass the bill omitting all reference to schools.[174]

Representative Finck of Ohio, who had been in the 39th Congress which proposed the Fourteenth Amendment, cited with approval the then recent decision of the Ohio Supreme Court in *State v. McCann*, 21 Ohio St. 198. He said it was rendered by "a full court . . . every member of who was a prominent member of the republican party . . . in which it was held that it was no infringement of the 14th article to the Constitution to prohibit Negro children from attending the same school with white children."[175] He also discussed the *Slaughter House Cases.*

There were again many speeches on the bill, particularly with reference to the school clauses. In the interest of brevity, they cannot be summarized here. Some favored the broad Senate version proposed by the *Cessna* amendment.[176] Others were

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[174] 43rd Cong., 2nd Sess., p. 1010.

[175] *Id.* at 948. Finck thought the whole bill unconstitutional and an unwarranted interference with the powers of the State. His speech is referred to in Flack, pp. 272-273.

[176] Rainey, Negro Representative of South Carolina, p. 959; Hoar of New York, p. 979; Roberts of New York, p. 980; Lewis, a Republican from Tennessee, p. 998; Burrows of Michigan, p. 1000; Phillips of Kansas, p. 1003; Shanks of Indiana, p. 1003; Garfield of Ohio, p. 1004; Williams of Wisconsin, p. 1002; Lynch, Negro Representative from Mississippi, p. 945. (All references are to Congressional Record, 43rd Cong., 2nd Sess.)

against the whole bill but favored the *White* amendment to allow separate accommodations in carriers, inns, schools; and many were against compulsory mixed schools.[177]

Cain, a Negro Representative from South Carolina, suggested that for the sake of peace within the Republican Party, they might accept the school clause of the Committee.[178] Blount of Georgia reminded the House that the majority of the House was made up of "lame ducks" and that the country had spoken against the Civil Rights measure at the recent elections.[179] Phelps, a Republican of New Jersey, also reminded the House of the recent Republican defeat at the polls. He said:

> "To pass this bill, we defy the opinion of the people of the United States recently and emphatically declared; for if there was one issue on which we went to the country it was this . . . Upon this issue the two great parties went to judgment. And the people last fall declared their judgment, and *with a thunder that shook one hundred members out of their seats.*"

He spoke against forcing mixed schools on the South.[180] Stanard of Missouri said his State had sep-

[177] Storm of Pennsylvania, pp. 950-952; Lamar and Hunter of Virginia, *id.* at Appendix, pp. 119 *et seq.*; Whitehead of Virginia, pp. 952-957; Smith of Virginia, p. 960 and Appendix p. 156; Blount of Georgia, p. 977; Phelps of New Jersey, p. 1001; Finck of Ohio, p. 948; Southard of Ohio, p. 996; Brown of Kentucky, p. 938; Small of New Hampshire, p. 981.

[178] 43rd Cong., 2nd Sess., p. 957.

[179] *Id.* at 977.

[180] *Id.* at 1002.

arate schools, and that they were necessary for the education of both races.[181] Chittenden of New York thought the bill unduly vexatious to both races.[182] Small of New Hampshire said he didn't think the Senate bill required mixed schools "only that they shall have equal privileges."[183]

Since the *Kellogg* amendment was adopted, his explanation of his amendment to the House is pertinent:

> "The amendment I have proposed is to strike out of the House bill reported by the Committee on the Judiciary all that part which relates to schools; and I do it, Mr. Speaker, in the interest of education, and especially in the interest of the education of the colored children of the Southern States. . . . The proviso to the first section is one that makes a discrimination as to classes of persons attending public schools; and I do not wish to make any such provision in an act of Congress.
>
> "But upon this school question we should be careful that we do not inflict upon the several States of the Union an injury that we ought to avoid. A school system in most of the Southern States has been established since the war of the rebellion, by which the colored children of the South have the advantages of an education that they never could have before that time. I believe, from all the information I can obtain, that you will destroy the schools in many of the Southern States if you insist upon this provision of the bill. You will destroy the work of

[181] 43rd Cong., 2nd Sess., p. 981.
[182] *Id.* at 982.
[183] *Id.* at 981.

the past ten years and leave them to the mercy of the unfriendly legislation of the States where the party opposed to this bill is in power. *And besides, this matter of schools is one of the subjects that must be recognized and controlled by State legislation.* The States establish schools, raise taxes for that purpose, and they are also aided by private benefactions; and they have a right to expend the money, so raised, in their own way. . . ." 43rd Cong., 2nd Sess., p. 997.

After adopting the amendment of Mr. Kellogg of Connecticut[184] the House passed the bill on February 4, 1875.[185] The bill then went to the Senate.

The House Bill (H. R. 796) was taken up by the Senate on February 26, 1875. There were few speeches, and most of the discussion was with reference to the jury service provision.[186] There was some debate on the constitutionality of the bill.[187] After this short debate, the bill was passed the same day.[188] It was signed by President Grant on March 1, 1875.[189]

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[184] 43rd Cong., 2nd Sess., p. 1010.

[185] *Id.* at 1011.

[186] Thurman of Ohio moved to amend the bill to limit its jury provisions to Federal Courts (*id.* at 1791); his amendment was defeated, p. 1867.

[187] That it was unconstitutional: Carpenter of Wisconsin, p. 1861; Dennis of Maryland, p. 1865; Thurman of Ohio, p. 1791. That it was constitutional: Boutwell of Massachusetts, p. 1792; Morton of Indiana, p. 1794.

[188] *Id.* at 1870.

[189] *Id.* at 2013.

E. The Present Acts of Congress Providing for and Recognizing Separate Schools

1. *Congress Has Continued to Maintain Separate Schools in the District of Columbia.*

In 1874, as part of the Revised Statutes for the District of Columbia, Congress provided that:

> "It shall be the duty of the school board to provide suitable and convenient . . . schools for colored children . . . and to endeavor to promote a thorough, equitable, and practicable education of colored children . . . of the district.
>
> "Any white resident shall be privileged to place his . . . child . . . at any one of the schools provided for . . . white children . . . and any colored resident shall have the same right with respect to colored schools."[190]

The same Act in Section 294 provided that "there shall be a board of trustees of schools for colored children in the cities of Washington and Georgetown . . ." and Section 304 stated that "there shall be a superintendent of schools for colored children. . . ."

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[190] Sections 281 and 282 of Revised Statutes Relating to the District of Columbia, U. S. Gov. Printing Office 1875. There have been other changes, not relevant here, in the number and composition of the school boards or Commissioners in charge of the schools. See Ingle, *The Negro in the District of Columbia*, Johns Hopkins University Studies, 11th Series (1893), pp. 29 *et seq.* and the opinion of the Circuit Court of Appeals for the District of Columbia in *Carr v. Corning*, decided February 14, 1950 (unreported yet). The major Acts are: 20 Stat. 107 (1878); 22 Stat. 142 (1882); 28 Stat. 693 (1895); 34 Stat. 316 (1906).

The Congressional Acts presently in force include the following provisions:

> "It shall be the duty of the Board of Education to provide suitable and convenient . . . schools for colored children . . ."
>
> "Any white resident shall be privileged to place his or her child . . . at any one of the schools provided for the education of white children . . . and any colored resident shall have the same rights with respect to colored schools."
>
> "It shall be the duty of the proper authorities of the district to set apart . . . from the whole fund received . . . such a proportionate part of all moneys received . . . as the colored children . . . bear to the whole number of children, white and colored . . ."[191]
>
> "It is the duty of the Board of Education to provide suitable rooms and teachers for such a number of schools . . . as, in its opinion, will best accommodate the colored children of the District of Columbia."[192]

2. *Grants to Separate Land-Grant Colleges*

The present acts of Congress[193] recognize the validity of separate colleges for white and Negro students by providing funds for separate land-grant agricultural and mechanical colleges (including Texas A. & M. College for white students and Prairie View

[191] District of Columbia Code (1940 ed.), Sec. 31-1110, 1111, 1112.

[192] D. C. Code 31-1113; Sec. 31-109 provides for one white and one colored first assistant superintendents for the respective schools.

[193] 7 U.S.C., § 323.

A. & M. College for Negro students of Texas). The history of this act (known as the Morrill Act) is pertinent, particularly in view of the fact that Senator Morrill of Vermont, after whom the bill is named, had not only been a member of the 39th Congress but a Republican member of the Committee of Fifteen which proposed the Fourteenth Amendment.

Land-grant colleges were established in the States to take advantage of an Act of July 2, 1862, which granted certain lands to the States, the proceeds from the sale of which were to be applied to agricultural and industrial education.[194] The original act provided that those States which were "in rebellion or insurrection against the government of the United States" were to receive no benefits.

On March 25, 1890, Senator Morrill of Vermont introduced a bill to apply the proceeds of the sale of public lands to public education and the support of the land-grant colleges.[195]

As reported from the Senate Committee, Section 2 of the bill read in part:

> "*Provided*, That no money shall be paid out from the college fund arising under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance

[194] 12 Stat. 503 (1862); this act was supplemented in 1870 to establish "agricultural experimental stations" at colleges established under the original act. 24 Stat. 440 (1887).

[195] 51st Cong., 1st Sess., p. 2595. These colleges were those teaching "Agriculture and the Mechanic Arts" the same as those established under the Act of 1862.

of such colleges separately for white and colored students shall be held to be a compliance with the provisions of this act."[196]

Objection was made that the bill attempted to interfere with the internal operation of the land-grant colleges, which, it was argued, is a State function.[197] This was the principal objection to the bill and most of the debate was confined to this point and to the amount of money to be granted.

Senator Pugh of Alabama offered the following amendment to be added to Section 2:

"*Provided further*, That the Legislature of any State in which institutions of like character have been established and are now being aided by such State out of its own revenue for the education of colored students in agricultural or the mechanical arts, whether styled colleges or not, and whether they have or not received any money heretofore under the act to which this is an amendment, may appropriate any portion of the fund received under this bill to such institutions so established and aided by such State as a compliance with the provision in reference to separate colleges for white and colored students."[198]

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[196] 51st Cong., 1st Sess., p. 6085. A committee amendment deleted the words "from the college fund arising." A substitute bill had previously been considered. *Id.* at 4003 and 6083.

[197] 51st Cong., 1st Sess., pp. 6332-6336. Morgan of Alabama, Reagan of Texas, Hawley of Connecticut, and Plumb of Kansas indicated vigorously their belief in this proposition.

[198] 51st Cong., 1st Sess., p. 6431. A similar amendment had been proposed by Senator Hoar of Massachusetts. *Id.* at 6345.

The purpose of this amendment was, it was stated, to overcome a difficulty created by the Act as reported from the committee in that it provided that only one college could be benefited, thus prohibiting benefits to the second college in those States which had one for Negro students and one for white students.[199]

Senator Morrill offered to accept the proposed amendment.[200] The debate on the amendment offered by Senator Pugh was concerned primarily with the determination of an equitable distribution of the funds within the States and an apprehension that perhaps the fund might be dissipated by the establishment of too many schools. Senator Hoar of Massachusetts, who had been outspoken in favor of the civil rights of Negroes as a member of the House in previous Congresses, stated that

> ". . . in the institution in my State colored and white youth study together . . . wherever colored and white youth do not study together the bill should secure equal provision for colored youth. . . ."[201]

Senator Hawley of Connecticut stated:

> "I will not object to the provision . . . which forbids any distinction of race or color . . . but allows the establishment and maintenance of such colleges separately for white and colored students. . . ."[202]

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[199] 51st Cong., 1st Sess., p. 6344.
[200] *Id.* at 6341.
[201] *Id.* at 6345.
[202] *Id.* at 6346.

Senator Ingalls of Kansas, after remarking that his State had only one school, stated, with reference to the Southern States, that

> "I believe that it is inappropriate and improper, in various ways detrimental to the interests of both races, that coeducation should be conducted."[203]

As a compromise the following was offered in lieu of the amendment of Senator Pugh of Alabama:

> "*Provided further*, That in any State in which there has been one college established in pursuance of the act of July 2, 1862, and also in which an educational institution of like character has been established and is now aided by such State from its own revenue for the education of colored students in agriculture and the mechanic arts, however named or styled, or whether or not it has recevied money heretofore under the act to which this act is an amendment, the Legislature of such State may propose and report to the Secretary of the Interior a just and equitable division of the fund to be received under this act between one college for white students and one institution for colored students established as aforesaid, which shall be divided into two parts and paid accordingly. And thereupon such institution for colored students shall be entitled to the benefits of this act and subject to its provisions as much as it would have been included under the act of 1862; and the fulfillment of the foregoing provisions shall

[203] 51st Cong., 1st Sess., p. 6349.

be taken as a compliance with the provision in reference to separate colleges for white and colored students."[204]

The amendment was accepted[205] and the bill was passed by the Senate containing both the amendment and the original provision with regard to separate schools for Negroes.[206]

Thus, as it then passed in the Senate (and as it reads today), Senator Morrill's bill provided:

"*Provided*, That no money shall be paid out under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of this act. . . . *Provided*, That in any State in which there has been one college established in pursuance of the act of July 2, 1862, and also in which an educational institution of like character has been established, or may be hereafter established, and is now aided by such State from its own revenue, for the education of colored students in agriculture and the mechanic arts . . . the Legislature of such State may propose and report to the Secretary of the Interior a just and equitable division of the fund to be received under this act between one college for white students and one institution for colored stu-

[204] 51st Cong., 1st Sess., p. 6369, Section 1.
[205] *Id.* at 6370.
[206] *Id.* at 6372.

dents . . . and the fulfillment of the foregoing provisions shall be taken as a compliance with the provision in reference to separate colleges for white and colored students."[207]

Passage of the bill by the House was completed with no debate on the provision allowing donations to separate schools on August 19, 1890.[208] The Senate concurred in the House amendment to that part of the bill which named the type of instruction to be given.[209] The bill was signed by the President on August 30, 1890.[210]

Thus, by virtue of a bill introduced by a Senator who had been a member of the committee which proposed the Fourteenth Amendment, the 51st Congress, by making appropriations to separate schools, interpreted the Fourteenth Amendment and the civil rights legislation as not prohibiting separate schools for white and Negro students.

3. *Grants from National School Lunch Act to Separate Schools*

The present National School Lunch Program Acts recognize separate schools and authorize payments to the separate schools. The act provides in part:

". . . If a State maintains separate schools for minority and for majority races, no funds

[207] 51st Cong., 1st Sess., p. 8828.

[208] *Id.* at 8839. The bill had been referred to the Committee on Education, reported favorably, and debated in the House. *Id.* at 6464, 7228, 8828.

[209] *Id.* at 8874.

[210] *Id.* at 9388; 26 Stat. 417 (1890).

made available pursuant to this chapter shall be paid or disbursed to it unless a just and equitable distribution is made within the State, for the benefit of such minority races, of funds paid to it under this chapter."[211]

II. CONSTRUCTION OF THE FOURTEENTH AMENDMENT BY THE STATE LEGISLATURES

An examination of the contemporaneous Acts of the Legislatures of the States will show that the Legislatures did not construe the Fourteenth Amendment, which was proposed in 1866 and became effective in 1868, to abolish the police power of the States to provide equal education for their white and Negro students in separate institutions.

In addition to the Acts of Congress providing separate schools in the District of Columbia, and the Acts of the legislatures of the 17 Southern States which still require separate schools,[212] the Legislatures of the Northern States considered that they had the power to legislate separate or mixed schools. The acts of these States which were represented in the 39th Congress when the resolution submitting the Fourteenth Amendment was adopted will be briefly set out:

California.—In 1869, almost immediately after the adoption of the Fourteenth Amendment in 1868, a statute was enacted which provided for the educa-

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[211] 60 Stat. 233, 42 U.S.C., § 1760(c) (1946).

[212] These Acts are set out in the Appendix of the Amicus Curiae brief of the Southern States.

tion of "children of African descent, and Indian children" in separate schools.[213] In 1872 the law provided that the schools must be open to all "white children between five and twenty-one years of age," and the above law of 1869 was codified.[214]

Delaware.—In 1857 the school committee of each district was delegated the power to provide for schools "free to all white children of the district."[215] Since that time separate schools for white and Negro students have been provided by the Constitution and statutes.[216]

Indiana.—The joint resolution proposing the Fourteenth Amendment was ratified by Indiana in 1867. In 1869, after the adoption of the Fourteenth Amendment, the Legislature enacted a law providing that the trustees "shall organize the colored children into separate schools."[217] This statute was reenacted with some changes in 1877.[218]

Kansas.—The Fourteenth Amendment was ratified by Kansas in 1867. By a statute of 1868, the boards of education in cities of the first class were given the power to establish separate schools for white and

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[213] Cal. Laws, 1869-70, c. 145, Sec. 56, p. 839.
[214] Cal. Political Code, 1872, Secs. 1662, 1669.
[215] Del. Rev. Stat., c. 42, Sec. 11(3), p. 207 (1852).
[216] Del. Const., Art. X, Sec. 2 (1897); Del. Laws 1881, c. 362, p. 385; Del. Laws 1889, c. 540, p. 651; Del. Rev. Stat., c. 66, p. 341 (1852 as amended 1893).
[217] Ind. Laws 1869, p. 41.
[218] Ind. Laws 1877, p. 124.

Negro children.[219] This statute was amended in 1879 and 1905 but the provisions relating to separate schools were reenacted each time.[220]

Kentucky.—Several statutes providing for separate schools in the cities were enacted in 1871 and 1872.[221] This policy was continued when the public school systems were established.[222] A constitutional provision in 1891 and a statute covering the educational system of the entire State in 1892 both provide for separate schools.[223]

Maryland.—A statute providing finances for separate schools was passed in 1870.[224] Subsequent statutes carried forward this policy of separation in education.[225]

Missouri.—A provision in the Constitution of 1865 required separate schools for "children of African descent."[226] With this provision in the Constitution the Fourteenth Amendment was ratified by Missouri in 1867. The Constitution of 1875 contained a sim-

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[219] Kan. Laws 1868, c. 18, Sec. 75, p. 146.

[220] Kan. Laws 1879, c. 81, Sec. 1, p. 163; Kan. Laws 1905, c. 414, Sec. 1, p. 676.

[221] 1 Ky. Laws 1871-72, c. 594, Sec. 10, p. 62; 2 Ky. Laws 1871-72, c. 112, p. 194; 2 Ky. Laws 1871-72, c. 520, Sec. 8, p. 598.

[222] Ky. Laws 1879, c. 894, p. 273; Ky. Laws 1879, c. 377, Sec. 9, p. 340.

[223] Ky. Const., Sec. 187 (1891); Ky. Laws 1891-92-93, c. 260, Art. XIV, p. 260.

[224] Md. Laws 1870, c. 18, p. 555.

[225] Md. Laws 1872, c. 18, p. 650; Md. Laws 1874, c. 463, p. 690; 2 Md. Rev. Stat., c. 18, Secs. 124-127 (1904).

[226] Mo. Const., Art. IX, Sec. 2 (1865).

ilar provision for "separate free schools" for Negroes.[227] Similarly the statutes provided for separate schools and the procedure for their operation.[228]

New Jersey.—The Fourteenth Amendment was there ratified in 1866. In 1881 a statute was enacted that "no child . . . shall be excluded from any public school . . . on account of . . . color."[229] An industrial school for Negroes was established in 1895, and it remains in operation.[230] Separate schools were in existence[231] until they were specifically prohibited by a provision in the new Constitution in 1949.

New York.—In 1864, the school boards were empowered to establish separate schools for "youth of African descent."[232] The Fourteenth Amendment was there ratified in 1867. In 1894, additional legislation was passed providing for separate schools for Negroes.[233]

Ohio.—The law in 1848 and 1849 provided for separate schools for Negroes.[234] Ratification of the Fourteenth Amendment was there completed in 1867. In

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[227] Mo. Const., Art. XI, Sec. 3 (1875).

[228] Mo. Laws 1874, Sec. 74, p. 164; 2 Mo. Rev. Stat., c. 150, Sec. 7052 (1879); 2 Mo. Rev. Stat., c. 143, Sec. 8002 (1889); 2 Mo. Rev. Stat., c. 154, Sec. 9774 (1899); 2 Mo. Rev. Stat., c. 106, Sec. 10793 (1909).

[229] N. J. Laws 1881, c. 149, p. 186.

[230] 3 N. J. Gen. Stats., Schools, Secs. 315-320, p. 3073, (1709-1895); N. J. Laws 1904, c. 1, Secs. 201-204, p. 76.

[231] Murray, *Negro Handbook*, p. 132 (1949).

[232] N. Y. Laws 1864, Title 10, p. 1281.

[233] 2 N. Y. Laws 1894, Art. 11, p. 1289.

[234] Ohio Laws 1847-8, p. 81; Ohio Laws 1848-9, p. 17.

1878 a statute provided that the boards of education might "organize separate schools for colored children."[235] Similarly in 1880 the power to establish separate schools was again legislated.[236]

West Virginia.—In 1865 the Legislature provided for separate schools.[237] In 1867 the Fourteenth Amendment was ratified. In 1871 the Legislature provided that "white and colored persons shall not be taught in the same school."[238] This mandate was repeated in 1872,[239] 1881,[240] and 1884.[241]

Oregon,[242] Vermont,[243] Rhode Island,[244] New Hampshire,[245] and Nebraska[246] having small Negro populations did not specifically legislate as to separate or mixed schools. The Constitution of Iowa prohibited separate schools; and in the same year of the adoption of the Fourteenth Amendment, its Supreme Court held a statute providing for separate schools unconstitutional under the Iowa (not the United States) Constitution.[247] Massa-

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[235] Ohio Laws 1878, p. 513.
[236] Ohio Rev. Stats. 1880, c. 9, Sec. 4008, p. 1005.
[237] W. Va. Laws 1865, c. 59, Sec. 17, p. 54.
[238] W. Va. Laws 1871, c. 152, Sec. 19, p. 206.
[239] W. Va. Laws 1872-3, c. 123, Sec. 17, p. 391.
[240] W. Va. Laws 1881, c. 15, Secs. 17, 18, p. 176.
[241] W. Va. Code, Art. 12, Sec. 8, p. 35 (Worth 1884).
[242] Ore. Laws 1855, p. 466; Ore. Laws 1887, p. 23.
[243] Vt. Laws 1865-66, p. 94; Vt. Laws 1892, p. 251.
[244] R. I. Laws 1882, c. 50, p. 139.
[245] N. H. Laws 1867, c. 78, Sec. 19, p. 165; N. H. Laws 1878, c. 86, Sec. 19, p. 208.
[246] Neb. Rev. Stat., c. 79, Sec. 2, p. 664; Neb. Rev. Stat., c. 69, Sec. 2, p. 982 (1873).
[247] Iowa Laws 1858, c. 52, p. 65; *Clark v. Board of Directors*, 24 Iowa 266 (1868).

chusetts had mixed schools before the adoption of the Fourteenth Amendment.[248] Connecticut,[249] Maine,[250] Michigan,[251] Minnesota,[252] and Wisconsin,[253] each having maintained separate schools for whites and Negroes before the adoption of the Fourteenth Amendment, continued such policy after their ratification of the amendment until the policy was later changed by their own statutes, thereby evidencing their interpretation that the Fourteenth Amendment did not accomplish that purpose.

Illinois, which maintained separate schools prior to its ratification of the Fourteenth Amendment in 1867, continued that policy thereafter until 1874 when it enacted a statute discontinuing separate schools. Separate schools continued to exist, however, in sections of the State.[254]

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[248] Mass. Laws 1854-55, pp. 674-75; Mass. Laws 1904, c. 498, Sec. 4, p. 608; Mass. Rev. Stat., c. 498, Sec. 11, p. 1160 (Supp. 1889-1895).

[249] Conn. Laws 1835, Title 53, p. 321; Conn. Laws 1866, 1867, 1868, c. 58, p. 206.

[250] Me. Laws 1873, c. 124, Sec. 4, p. 78; Me. Laws 1887, c. 100, Sec. 31, p. 74; Me. Rev. Stat., Supplement 1885-1895, c. 11, Sec. 31, p. 132.

[251] Mich. Laws 1871, No. 170, Sec. 28, p. 274; 2 Howell's Ann. Stat., c. 3, Sec. 5070, p. 1334; 2 Mich. Comp. Stats., c. 136, Sec. 18, p. 1478.

[252] Minn. Laws 1864, c. 4, Sec. 33, p. 26; Minn. Stat., c. 14, Secs. 2998, 2999 (Mason 1927); Minn. Stat., c. 245, Sec. 10 (Mason 1927).

[253] Wisc. Rev. Stats. 1878, c. 27, Sec. 494, p. 185.

[254] Ill. Laws 1847, p. 120; Ill. Rev. Stat., c. 122, Sec. 100, p. 983; Ill. Rev. Stat. (Cathran 1883), c. 122, Sec. 101, p. 1406; Ill. Laws 1949, p. 53. Although cases arising in Alton, Illinois have been before the Illinois courts in 1886 and 1899, this city continues to maintain separate schools for white and Negro students. Alton Evening Telegraph, Jan. 23-26, 1950, p. 1, col. 1; Bond, *Education of the Negro in the American Social Order*, 382 (1934).

Nevada continued separate schools for Negroes by statute in 1867, the same year the Fourteenth Amendment was ratified, but in 1872 these statutes were declared unconstitutional under the Nevada Constitution.[255] In Pennsylvania the statutes providing for separate schools were retained after the Fourteenth Amendment was ratified. They were not repealed until 1881.[256]

Nowhere has any State statute requiring separate equal schools been declared to be in violation of the Fourteenth Amendment or any other provision of the Constitution of the United States. Where separate schools were abandoned, it was done on the voluntary action of the State Legislature.

III. CONTEMPORANEOUS CONSTRUCTION OF THE FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS ACTS BY THE STATE AND FEDERAL COURTS

The Fourteenth Amendment, the Civil Rights Acts of 1866 and 1875, and the other similar enactments were construed by the State and Federal courts during the period of their consideration and enactment. These cases may be looked to in order to determine the contemporary construction by the courts and thereby to ascertain from another source the status of separate schools under the Reconstruction enactments.

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[255] Nev. Laws 1864-65, c. 145, Sec. 50, p. 426; Nev Laws 1867, c. 52, Sec. 21, p. 95; *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342 (1872).

[256] Pa. Laws 1854, p. 623; Purdon's Digest, Common Schools, Sec. 54, p. 244 (Brightly 1700-1872); Pa. Laws 1867, p. 9; Pa. Laws 1872, p. 1048 repealing Pa. Laws 1855, Sec. 14, p. 12; Pa. Laws 1881, p. 76.

It was contended in a New York Court in 1869[257] that the provisions of the City charter in Buffalo, New York, providing for separate schools for white and Negro students "were inconsistent with the Act of Congress called the 'civil rights bill' and had therefore become inoperative." With regard to this contention the New York Court stated:

> "It was no part of the civil rights bill to regulate or provide for the enjoyment of rights or privileges of the nature of those in controversy in this case. A principal object of that act was to confer citizenship upon the colored people, and . . . to abrogate the rule . . . in . . . the Dred Scott case. . . . In addition to that, this act was intended to confer upon the colored people all the substantial rights of the citizen. And these, so far as they are affected by the act, are enumerated in the first section. . . . *It is clear that the right or privilege of attending a school provided for white children is not among those included in this section.* Nothing is contained in either of the succeeding sections of this act from which it is or can be claimed, that such a right or privilege can be derived, and it is, therefore, unnecessary that any particular reference should be made to them for the purpose of disposing of this case. They were enacted for the purpose of more effectually securing and maintaining the rights conferred by and enumerated in the first section." (p. 256.) (Italics are added throughout.)

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[257] *Dallas v. Fosdick*, 40 How. Prac. 249.

In Ohio in 1871 the statutory provision regarding separate schools was attacked as in contravention of the Fourteenth Amendment.[258]

The Ohio court stated:

> "Unquestionably all doubts, wheresoever they existed, as to the citizenship of colored persons, and their right to the 'equal protection of the laws,' are settled by this amendment. But neither of these was denied to them in this State before the adoption of the amendment. At all events, the statutes classifying the youth of the State for school purposes on the basis of color, and the decisions of this court in relation thereto, were not at all based on a denial that colored persons were citizens, or that they are entitled to the equal protection of the laws. It would seem, then, that these provisions of the amendment contain nothing conflicting with the statute authorizing the classification in question, nor the decisions heretofore made touching the point in controversy in this case.
>
> ". . . conceding that the 14th amendment not only provides equal securities for all, but guarantees equality of rights to the citizens of a State, as one of the privileges of citizens of the United States, it remains to be seen whether this privilege has been abridged in the case before us. The law in question surely does not attempt to deprive colored persons of any rights. On the contrary it recognizes their right, under the constitution of the State, to equal common school advantages, and secures to them their equal proportion of the school fund. It only regulates the mode and manner

[258] *State ex rel. Garnes v. McCann*, 21 Ohio St. 198.

in which this right shall be enjoyed by all classes of persons. The regulation of this right arises from the necessity of the case. Undoubtedly it should be done in a manner to promote the best interests of all. But this task must, of necessity, be left to the wisdom and discretion of some proper authority. The people have committed it to the general assembly, and the presumption is that it has discharged its duty in accordance with the best interests of all.

"At most, the 14th amendment only affords to colored citizens an additional guaranty of equality of rights to that already secured by the constitution of the State.

"The question, therefore, under consideration is the same that has, as we have seen, been heretofore determined in this State, that a classification of the youth of the State for school purposes, upon any basis which does not exclude either class from equal school advantages, is no infringement of the equal rights of citizens secured by the constitution of the State."

One year later (1872) the question as to whether separate schools violated the Fourteenth Amendment was again before the New York courts.[259] It was again held that so long as the separate schools were equal, the separation did not violate the Fourteenth Amendment.

In *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342 (1872) the court held that the particular statute providing for separate schools for Negroes was invalid under the Nevada Constitution (not the Fed-

[259] *People ex rel. Dietz v. Easton*, 13 Abb. (N. Y.) Pr. (N. S.) 159.

eral Constitution). As to the Fourteenth Amendment, however, the dissenting opinion pointed out that

> "The case of the relator was sought to be maintained on the ground that the statute was in violation of the fourteenth amendment to the constitution of the United States. *I fully agree with my associates that this position of counsel is utterly untenable.*"

All the judges agreed that separate schools were not in violation of the Fourteenth Amendment. They were also agreed that if equal, separate schools were provided for Negroes, the school trustees could assign Negroes to them and white students to other schools.

In 1873 the Pennsylvania court, in upholding a statute providing for separate schools, said:

> "In the case before us, we fail to discover that any great constitutional question is involved, or that any right of the relator, or his children, growing out of the Fourteenth Amendment of the Constitution of the United States, or under the Civil Rights Bill, has been challenged, invaded or denied. . . ."[260]

The contention that separate schools violated the Fourteenth Amendment and the Civil Rights Bill was also contemporaneously decided in the negative by the highest court of Indiana in 1874.[261] That court

[260] *Commonwealth v. Williamson*, 30 Legal Int. 406.
[261] *Cory v. Carter*, 48 Ind. 327.

interpreted the Civil Rights Bill of 1866 as granting only specifically named rights, not including the privilege of attending a State school:

> ". . . it is clear, admitting it to be valid, that it does not relate to or bear upon the right claimed in this case, for it purports only to confer upon negroes and mulattoes the right, in every state and territory, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and the full and equal benefit of all laws and proceedings for the security of person and property as enjoyed by white citizens, and subjects them to like pains and penalties. In this nothing is left to inference. Every right intended is specified."

Then with regard to the Thirteenth, Fourteenth, and Fifteenth Amendments,

> "In our opinion, such amendments have not in any other respect imposed restrictions or limitations upon the sovereign power of the State. From this it results that there is no limitation upon the power of the State, within the limits of her own constitution, to fix, secure, and protect the rights, privileges, and immunities of her citizens, as such, of whatever race or color they may be, so as to secure her own internal peace, prosperity, and happiness.
>
> "In our opinion, the classification of scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class. . . .

"The action of Congress, at the same session at which the fourteenth amendment was proposed to the States, and at a session subsequent to the date of its ratification, is worthy of consideration as evincing the concurrent and aftermatured conviction of that body that there was nothing whatever in the amendment which prevented Congress from separating the white and colored races, and placing them, as classes, in different schools, and that such separation was highly proper and conducive to the well-being of the races, and calculated to secure the peace, harmony, and welfare of the public; and if no obligation was expected to be or was imposed upon Congress by the amendment, to place the two races and colors in the same school, with what show of reason can it be pretended that it has such a compelling power upon the sovereign and independent states forming the Federal Union?

"We refer to the legislation of Congress relative to schools in the District of Columbia, at the first session of the Thirty-Ninth Congress, and the third session of the Forty-Second Congress."

After reviewing Congressional Acts on separate schools in the district, the opinion continued,

"This legislation of Congress continues in force, at the present time, as a legislative construction of the fourteenth amendment, and as a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the states for their approval and ratification."

Again in 1874, the question of separate schools being violative of the Fourteenth Amendment was decided in the negative by the California Supreme Court in *Ward v. Flood*, 48 Cal. 36:

> ". . . nor do we discover that the statute is, in any of its provisions, obnoxious to objections of a constitutional character. It provides in substance that schools shall be kept open for the admission of white children, and that the education of children of African descent must be provided for in separate schools."

Continuing, the Court said:

> ". . . our duties lie wholly within the much narrowed range of determining whether this statute, in whatever motive it originated, denies to the petitioner, in a constitutional sense, the equal protection of the laws; and in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense."

The Federal Circuit Court was presented with the problem of interpreting the Fourteenth Amendment in a case involving separate schools in 1878, *Bertonneau v. Board of Directors*, 3 Fed. Cases 294 (1878). There the court said:

> "Is there any denial of equal rights in the resolution of the board of directors of the city

schools, or in the action of the subordinate officers of the schools, as set out in the bill? Both races are treated precisely alike. White children and colored children are compelled to attend different schools. That is all. The state, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all.

"The state may be of opinion that it is better to educate the sexes separately, and therefore establishes schools in which the children of different sexes are educated apart. By such a policy can it be said that the equal rights of either sex are invaded? Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of right does not necessarily imply identity of rights."

In *People, ex rel. King v. Gallagher*, 93 N. Y. 438 (1883) the validity of the separation of white and Negro students in the schools was before the court. The court held that if an equal separate school was established the separation was not repugnant to the Fourteenth Amendment. It was stated:

"The highest authority for the interpretation of this amendment is afforded by the action of those sessions of Congress which not only immediately preceded, but were also contemporaneous with the adoption of the amendment in ques-

tion." (The court then discusses several Acts of Congress on the District of Columbia.)

"If regard be had to that established rule for the construction of statutes and constitutional enactments which require courts, in giving them effect, to regard the intent of the law-making power, it is difficult to see why the considerations suggested are not controlling upon the question under discussion.

"The question here presented has also been the subject of much discussion and consideration in the courts of the various States of the Union, and it is believed has been, when directly adjudicated upon, uniformly determined in favor of the proposition that the separate education of the white and colored races is no abridgement of the rights of either."

And further:

"The argument of the appellant's counsel, which is founded upon that clause of the constitutional amendment granting to every citizen the equal protection of the law, must fall with his main argument as being founded upon the unwarranted assumption that this protection has been denied to the relator in this case. Equality and not identity of privileges and rights is what is guaranteed to the citizen, and this we have seen the relator enjoy."

Similar cases arose in other States, the courts in these cases holding separate schools repugnant to some State Constitutional or statutory provision, but never holding separate schools prohibited by the

Fourteenth Amendment.[202] It will thus been seen that in those cases which arose during the period contemporary with the adoption of the Reconstruction measures, the courts were all of the opinion that the Fourteenth Amendment had no effect on the power of the States to provide separate schools for white and Negro students.

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[202] *Clark v. Board of Directors*, 24 Iowa 266 (1868); *People v. Board of Education*, 18 Mich. 400 (1869); *Chase v. Stephenson*, 71 Ill. 383 (1874); *Smith v. Board of Directors*, 40 Iowa 518 (1875); *Dove v. Ind. School Dist.*, 41 Iowa 689 (1875). See also *Martin v. Board of Education*, 42 W. Va. 514 (1896) upholding separation under the Fourteenth Amendment.

SECOND SECTION

Other Federal and State Court Decisions That the State May Furnish Education to White and Negro Students at Separate Institutions

Corbin v. School Board, 177 F. 2d 924 (C.C.A. 4th 1949). The Court stated that the question of the validity of separate schools was foreclosed against plaintiffs "by decisions of the United States Supreme Court, and no useful purpose could be served by adding to the able discussion of the problem in the opinion below." 84 F. Supp. 253 (W.D. Va. 1949).

Brown v. Board of Trustees, LaGrange Ind. School Dist., S. D. Tex., Feb. 16, 1950, denied an injunction against alleged discrimination in providing separate schools. Following the *Gaines* and *Sipuel* cases, the Court concluded that maintaining separate schools for white and Negro students does not violate the Fourteenth Amendment.

Jennings v. Board of Trustees, Hearne Ind. School Dist. (W.D. Tex., 1948, unreported). A suit to compel entrance of Negro students to white high school. A declaratory judgment was entered considering the Texas Constitutional provisions for separate schools and the equal protection clause of the Fourteenth Amendment. It concludes, "Under the above provisions, the defendants are required

to furnish separate, but impartial and substantially equal facilities to both Negro and white students."

Pitts v. Board of Trustees, 84 F. Supp. 975 (E.D. Ark., 1949) held that the Fourteenth Amendment does not require mixed schools, and that "such a course of action" would not be "for the best interest of the children of either race."

Boyer v. Garrett, D.C. Md., Dec. 30, 1949, held that it was proper, under the Fourteenth Amendment, for the State to provide separate recreation facilities for the white and Negro citizens.

Carter v. School Board, 87 F. Supp. 745 (E.D. Va., 1949). In holding that there was no discrimination in equal separate schools, the Court stated: "We find that the segregation in the public functions of the State, including education in public schools, is exclusively a State matter and . . . is not questionable save to assure equality."

Johnson v. University of Kentucky, 83 F. Supp. 707 (E.D. Ky., 1949). Citing the *Sipuel* and *Gaines* cases the Court held separate school facilities are valid under the Fourteenth Amendment, provided the facilities are equal.

Wrighten v. University of South Carolina, 72 F. Supp. 948 (E.D. S.C., 1947). The Circuit Court (unreported) returned the case to the District Court for a fact finding of equality of the separate

law school established after the first trial. In July, 1948, the trial court found that the Negro law school was substantially equal and denied Wrighten's injunction. (Opinion unreported.)

Bluford v. Canada, 32 F. Supp. 707 (W.D. Mo. 1940; appeal dism. 119 F. 2d 779) denied damages for refusal to admit Bluford to U. of Missouri School of Journalism.

State (Bluford) v. Canada, 348 Mo. 298 (1941) denied mandamus to admit Bluford to Missouri Journalism School.

State (Michael) v. Witham, 179 Tenn. 250 (1942), following the *Gaines* case, denied a mandamus to compel the admission of a Negro to Tennessee University.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Federal:			
	Wong Him v. Callahan 119 Fed. 381	Constitutionality of separate schools for Chinese children.	The separate school being equal, the separation does not violate the 14th Amendment.
	U. S. v. Buntin 10 Fed. 730	Indictment for deprivation of right to attend non-segregated school.	Ohio statute providing for separate schools, if schools are substantially equal, does not violate 14th Amendment.
	Bertonneau v. Board of Directors 3 Fed. Cases 294	Constitutionality of separate schools for Negroes.	The separate school being equal, the separation does not violate the 14th Amendment.
Alabama:			
	State v. Bd. of School Commissioners, 145 So. 575 (1933)	To obtain admission to white school.	Separation of children in schools is mandatory under statute.
Alaska:			
	Sing v. Sitka School Bd., 7 Alaska 616 (1927)	Constitutionality of separate schools for Negroes and Indians.	The separate school being equal, the separation does not violate the 14th Amendment.

Arkansas:		
State v. Board of Directors, 242 S. W. 545, Cert. Den. 264 U. S. 567 (1922)	To obtain admission to white school; plaintiff claimed no Negro blood.	Separation is proper and ruling of school board supported by evidence will not be disturbed.
Maddox v. Neal, 45 Ark. 121 (1885)	Constitutionality of separate schools for Negroes.	The separate school being equal, the separation does not violate the 14th Amendment.
Arizona:		
Burnside v. Douglas School, 261 Pac. 629 (1928)	Constitutionality of separate school for Negroes.	The separate school being equal, the separation does not violate the 14th Amendment.
Dameron v. Bayless, 126 Pac. 273 (1912)	Same as above.	Same as above.
Harrison v. Riddle, 36 P. 2d 984 (1934)	Mandamus to compel separation by school board.	Where substantially equal school is provided school board must separate pupils.
California:		
Ward v. Flood, 48 Cal. 36 (1874)	Constitutionality of separate schools for Negroes.	The separate school being equal, the separation does not violate the 14th Amendment.
Dist. of Columbia:		
Wall v. Oyster, 36 App. D.C. 50 (1910)	To contest being sent to separate school when there was no notice of statute providing for separate schools.	Statute is not invalid for lack of notice. Board may assign to separate school.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Florida:			
	State v. Bryan, 39 So. 929 (1905)	To test the constitutionality of the white university, when there was no similar Negro institution.	As long as Negroes have a State Normal, it is not unconstitutional to place the white normal in a university.
Georgia:			
	Blodgett v. Bd. of Ed., 30 S. E. 561 (1898)	To restrain appropriation for white high school when there was no appropriation for Negro high school.	Wrong action. No benefit to Negroes by attacking white high school. Action should be to compel a high school for Negroes.
	Bd. of Ed. v. Cumming, 29 S. E. 488, Aff'd 175 U.S. 528 (1898)	Same as above.	Same as above.
Indiana:			
	Cory v. Carter, 48 Ind. 327 (1874)	To contest separate schools.	A classification which does not exclude either class from equal accommodations is no infringement of rights.
	Greathouse v. School Board, 151 N. E. 411 (1926)	To prevent construction of separate high school as unlawful expenditure.	The separate school being equal, the separation does not violate the 14th Amendment.

State v. Gray, 93 Ind. 303 (1884)	To obtain admission to white high school.	The constitutionality of the law for the establishment of separate schools for white and Negro children is settled.
State v. Grubbs, 85 Ind. 213 (1882)	To compel town to organize school for Negroes.	To require Negro to attend near-by separate school was proper.
State v. Wirt, 177 N. E. 441 (1931)	To contest an alleged discrimination in separate schools.	Organization of separate schools must not result in denying equal privileges; but here no denial is shown.
Kansas:		
Reynolds v. Board of Education, 72 Pac. 274 (1903)	To test constitutionality of separate schools.	Separate schools do not violate the 14th Amendment.
Richardson v. Board of Education, 72 Kan. 629 (1906)	Same as above.	Same as above.
Wright v. Board of Education of Topeka, 284 Pac. 363 (1930)	To prevent transfer to Negro school because plaintiff had to pass white school to reach Negro school.	Separate schools, substantially equal are constitutional; inequality shown by plaintiff.
Kentucky:		
Board of Education v. Bunger, 41 S. W. 2d 931 (1931)	To contest the establishment of separate schools.	Board of Education has the power to establish separate schools.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Kentucky—Cont'd.			
	Daviess Co. Bd. v. Johnson, 200 S. W. 313 (1918)	To obtain identical facilities.	Facilities need not be identical if they are equal.
	Grady v. Bd. of Education, 147 S. W. 928 (1912)	To contest the establishment of separate schools.	Board of Education has the power to establish separate schools.
	Mullins v. Belcher, 134 S. W. 1151 (1911)	To test constitutionality of separate schools.	The separate schools being equal, the separation does not violate the 14th Amendment.
	Prowse v. Board of Education, 120 S. W. 307 (1909)	To contest the establishment of separate schools.	Board of Education has the power to establish separate schools.
Maryland:			
	Williams v. Zimmerman, 192 Atl. 353 (1937)	To obtain admission to white school.	Negro student cannot be admitted to white school; substantially equal Negro school being provided.
Massachusetts:			
	Roberts v. City of Boston, 5 Cush. (Mass.) 198 (1849)	To obtain admission to a white school.	School Board has the power to separate Negro and white students. Admission denied.

Mississippi:		
Barrett v. Cedar Hill S. D., 85 So. 125 (1920)	To contest bond issue for consolidated school because discriminatory.	Since there are ample substantially equal schools for Negroes they cannot contest establishment of school for whites.
Bond v. Tij Fung, 114 So. 332 (1927)	To obtain admission of Chinese boy in white school.	The separate school being equal, the separation does not violate the 14th Amendment.
Bryant v. Barnes, 106 So. 113 (1925)	To contest an alleged discrimination in establishing school districts.	Court will prohibit discrimination between races in the operation of the schools, but no discrimination is shown by separation.
Chrisman v. Town of Brookhaven, 70 Miss. 477 (1893)	To test the constitutionality of separate schools.	The separate school being equal, the separation does not violate the 14th Amendment.
Missouri:		
Lehew v. Brummell, 15 S. W. 765 (1891)	To set up discrimination between white and Negro schools.	Schools being substantially equal there was no discrimination.
State v. Cartwright, 99 S. W. 48 (1907)	To test constitutionality of separate schools.	Separate schools do not violate 14th Amendment.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
New York:			
	People v. Gallagher, 93 N. Y. 438 (1883)	To contest separate schools.	When statute provides for separate, equal schools, excluding Negroes from white schools is constitutional.
	People v. School Board 161 N. Y. 598 (1900)	Same as above.	Same as above.
	People v. Easton, 13 Abb. (N. Y.) Pr. N. S. 160 (1872)	Same as above.	Same as above.
	Dallas v. Fosdick 40 How. Prac. 249 (1869)	Same as above.	Same as above.
North Carolina:			
	Bonitz v. Trustees, 70 S. E. 735 (1911)	To test constitutionality of tax for white schools only.	Separate schools are constitutional when substantially equal hence tax must be construed as applying to both white and Negro schools.
	Johnson v. Bd. of Education, 82 S. E. 832 (1914)	To contest constitutionality of separate schools.	Advantages being equal separate schools are constitutional.

Lowery v. Sch. Trustees, 52 S. E. 267 (1905)	To contest alleged discrimination in separate schools.	Separate schools, substantially equal, are constitutional; no discrimination shown.
McMillan v. School Committee, 107 N. C. 609 (1890)	To compel school committee to admit Negroes.	Statute requiring separate schools was binding on Committee.
North Carolina—Cont'd.		
Whitford v. Bd., 74 S. E. 1014 (1912)	To get interpretation of constitutional provisions of separate schools.	Statute providing for substantially equal school would be constitutional.
Puitt v. Gaston Co., 94 N. C. 709 (1886)	To test constitutionality of separate schools.	Advantages being equal, separate schools are constitutional.
Smith v. Robersonville, 53 S. E. 524 (1906)	To contest alleged discrimination in separate schools.	Separate schools, substantially equal, are constitutional; no discrimination shown.
Nevada:		
State v. Duffy, 7 Nev. 342 (1872)	To restrain board from separating white and Negro students.	The separate school being equal, the separation does not violate the 14th Amendment.
Ohio:		
State v. Bd. of Education, 7 Ohio Dec. 129 (1876)	To contest alleged discrimination in separate schools.	Separate schools, substantially equal, are constitutional; no discrimination shown.
State v. McCann, 21 Ohio St. 198 (1871)	To contest separate schools.	Establishment of separate schools substantially equal is constitutional.

OTHER FEDERAL AND STATE COURT CASES (Cont'd)

State	Case	Issue	Decision
Oklahoma:			
	School District v. Board, 275 Pac. 292 (1928)	To recover State Aid Funds from Board of County Commissioners.	Separate schools with like conditions must be provided and impartially maintained.
	Jumper v. Lyles, 185 Pac. 1084 (1921)	To prevent certain schools being designated Negro schools.	The Board has the power to determine which separate school shall be attended by white or Negro students.
	State v. Albritton, 224 Pac. 511 (1924)	To test constitutionality of separate schools.	Facilities being substantially equal, separate schools are constitutional.
Pennsylvania:			
	Commonwealth v. Williamson, 30 Leg. Int. 406 (Pa. 1873)	To contest exclusion from public schools.	Under statute if twenty Negro children appeared for admission a separate school may be established.
South Carolina:			
	Tucker v. Blease, 81 S. E. 668 (1914)	To prevent exclusion of Negro from white school.	School Board may set up separate school for these persons and if substantially equal it is constitutional.
Tennessee:			
	Greenwood v. Rickman, 235 S. W. 425 (1921)	To test separate schools as discriminatory, for tax purposes.	When equal opportunities are given in free schools there is no discrimination in taxes.
Virginia:			
	Eubank v. Boughton, 36 S. E. 529 (1900)	To compel admission to white schools.	The duty is upon the school board to provide separate schools. Admission denied.
West Virginia:			
	Martin v. Board of Education, 26 S. E. 348 (1896)	To test constitutionality of separate schools.	The separate school being equal, the separation does not violate the 14th Amendment.

THIRD SECTION

ANNOUNCEMENT OF APPROVAL OF NEGRO LAW SCHOOL BY AMERICAN BAR ASSOCIATION

AMERICAN BAR ASSOCIATION

Section of Legal Education and Admissions to the Bar

September 14, 1949

Dean Ozie Harold Johnson
Texas State University For Negroes
School of Law
Austin, Texas

My dear Dean Johnson:

This will advise you that your school was granted provisional approval, subject to an annual inspection until full approval be granted, at the annual meeting of the American Bar Association in St. Louis last Thursday, September 8th. This approval was granted upon the recommendation of the Council of the Section of Legal Education and Admissions to the Bar.

Our heartiest congratulations not only on the approval but on the splendid record which you have made to date.

Respectfully yours,

(Sgd) JOHN G. HERVEY,
Adviser.

STATEMENT OF AMERICAN BAR ASSOCIATION REGARDING APPROVAL OF NEGRO LAW SCHOOL

AMERICAN BAR ASSOCIATION

Section of Legal Education and Admissions to the Bar

March 9, 1950

Dean Ozie Harold Johnson
Texas State University for Negroes
School of Law
Houston, Texas

My dear Dean Johnson:

I have just received copy of catalogue of the University of Texas Law School, made a comparison with that of your school, and the thought occurred to me that you probably may want to make some mention in your new catalogue of approval of your school by the American Bar Association. No objection would be made to the inclusion of a statement in your catalogue that "The school is approved by the American Bar Association."

I advised you last September that the school had been granted provisional approval by the House of Delegates subject to an annual inspection until full approval be granted. So far as it affects your school the distinction between provisional approval and full approval is a technical one. The standards exacted are identical whether approval be provisional or full. This for the reason that the distinction was created some years ago when applications came be-

fore the Council from law schools which were not attached to established universities or colleges or which did not have endownment funds. You can appreciate that the absence of an endownment fund and the absence of attachment to an established institution can influence scholarship standards. In that situation the Council voted to grant provisional approval and watch for a period of time to ascertain what influence, if any, was had on scholarship standards. The policy of the Council since that date, however, has been to recommend provisional approval of applicant schools which are found to be in full compliance with the standards and to make annual inspections until full approval be granted. This was done in the case of your school. Like action was taken as respects the University of New Mexico Law School and the University of California Law School at Los Angeles.

The Council found your school not only to be in full compliance with its standards but to exceed those standards in many respects. We have no doubt but that your school will continue to comply and your situation is in no way similar to that of those schools which have no endowment fund or are not parts of established, accredited institutions. Thus I can assure you that no objection would be taken, as stated above, to the reference indicated in future imprints of your catalogue.

Respectfully yours,
JOHN G. HERVEY,
Adviser.

ANNOUNCEMENT BY AMERICAN ASSOCIATION OF LAW SCHOOLS THAT THE NEGRO LAW SCHOOL MET ITS STANDARDS

Chicago, Illinois
December 29, 1949

The School of Law of the Texas State University for Negroes applied for admission. The Committee has investigated its qualifications and finds that the school complies with our requirements and standards at this time. In view, however, of the pendency in the Supreme Court of a case which may well reexamine the validity of the constitutional test for such an institution as hitherto understood, the Committee and the school have agreed that action on the application be deferred.

For the Executive Committee of the Association of American Law Schools.

(Sgd) F. D. G. RIBBLE
Secretary-Treasurer

CERTIFICATE OF TEXAS SUPREME COURT CONCERNING THE ADMISSION TO THE BAR OF HENRY E. DOYLE

THE SUPREME COURT OF TEXAS

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the records of this office show that Henry E. Doyle took and successfully passed the State Bar Examination in October, 1949, and was duly admitted and licensed as an attorney and counselor at law by the Supreme Court of Texas on the 1st. day of December, 1949.

I further certify that the records on file in this office show that the said Henry E. Doyle was a student of the Law School of The Texas State Univer-

sity for Negroes, having begun his studies in said University on September 10, 1947.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas at the City of Austin, this, the 6th day of March, 1950.

(Sgd) GEO. H. TEMPLIN,
[Seal] Clerk of the Supreme Court of Texas.

ANSWER OF ATTORNEY GENERAL OF TEXAS TO REQUEST OF FEDERAL COUNCIL OF CHURCHES FOR CONSENT TO FILE AMICUS CURIAE BRIEF

December 28, 1949

Hon. Charles H. Tuttle
15 Broad Street
New York 5, N. Y.

Dear Mr. Tuttle: Re: Sweatt v. Painter, et al.

This will acknowledge your request for our consent to your filing in the above case an amicus curiae brief on behalf of The Federal Council of Churches. Your proposed brief undertakes to support the contention of the petitioner, Heman Marion Sweatt, that it is unconstitutional for State governments to provide separate schools for students of the white and Negro races even if the separate facilities are equal.

Your brief, purporting to speak for all of the Council's member denominations (except the Presbyterian Church, which "disassociated" itself from the brief) contains and undertakes to support the following statement:

> "The Federal Council of the Churches of Christ in America hereby renounces the pat-

tern of segregation in race relations as unnecessary and undesirable and a violation of the Gospel of love and human brotherhood. . . ."

As my First Assistant, Mr. Joe R. Greenhill, told you by telephone, we will consent to your filing the brief if you will add thereto a disclosure of the fact that the religious denominations represented by the Federal Council maintain separate churches, separate church schools, separate denominational colleges, and segregated congregations for white and Negro citizens in Texas and fourteen other Southern States.

On the point you seek to cover as to "necessity and desirability" of separate physical facilities, your practice is equally as important as your preachment, and I would not voluntarily consent to your presentation of the latter without a full and frank disclosure of the former.

Some of these denominations have fine schools and excellent churches for white and Negro citizens in Texas, but they are separate just as the State schools are separate. The compelling reasons which caused the people of Texas to adopt such a policy in their constitution undoubtedly were and are apparent to those forming the policies of the churches.

It is doubtful if the Federal Council speaks the true sentiment of the Southern congregations or the *actual practice* of the Northern congregations on this issue. Be that as it may, a full disclosure of the actual practice of the Council's member churches in Texas should be made so the Court will have the true and complete picture. Otherwise, the Court might

be led to believe from your statement of Council policy that the member churches no longer maintain separate schools and congregations in this State and that they are no longer thought to be "necessary and desirable."

In all fairness to my State, to Texas' congregations of the fine churches which belong to the Federal Council, and to previous Supreme Court decisions on this subject, I must say that you are mistaken in your belief that segregation has been maintained or permitted here because of a contention of racial superiority or inferiority. It has been based solely upon the right of a State or a church to offer the same education or worship in separate schools or separate churches if the segregated system would better preserve the peace, welfare, opportunities and happiness of a majority of both races.

If you will advise the Court in your brief of the policy and practice now being followed by your member churches in Texas and other Southern States, I will gladly consent to the filing of your brief. Otherwise, I must decline.

I wish you Godspeed in the work of the church and regret that I must differ with you in this regard.

Very truly yours,

(Sgd) PRICE DANIEL
Attorney General of Texas

THE TEXAS POLL

The Statewide Survey of Public Opinion, Austin, Texas

Austin, Texas, March 18.—The case for opening the doors of The University of Texas to Negro students is making little headway in the court of public opinion.

In its latest survey, The Texas Poll finds the general attitude of the adult public much the same as it was two years ago. The Poll's finding is based on comparable statewide surveys in which representative cross sections of the population were asked this question:

"Generally, are you for or against Negroes and whites going to the same universities?"

	March 1948	Now
Against	76%	76%
For	20	20
No opinion	4	4
	100%	100%

Even the pattern of opinion by races and educational levels was found relatively unchanged. A comparison of the percentages favoring Negroes and whites in the same universities follows:

	March 1948	Now
Whites	11%	12%
Negroes	78	74
By Education:		
College-Trained adults	29%	31%
High school trained	15	15
Grade school or less	17	19

The results show that only Negroes, as a group, give a majority vote to the idea of teaching both races in the same universities. A substantial minority of college-trained adults supports this view, but the lower educational levels who make up the greater portion of the population are strongly opposed.

Some who favor the general policy of barring Negroes from the University say they would not object if one or two were admitted to the law school or if advanced students were allowed to enroll in graduate courses not available elsewhere in Texas. But the majority of Texas adults is opposed even to these exceptions.

In the latest survey, conducted February 20-25, The Texas Poll put these specific issues before a cross section of 1,000 adults of all walks of life:

> "Would you object if one or two Negro law students were allowed to study in The University of Texas at Austin?"

	Negroes	Whites	All
Would object	8%	69%	60%
Would not object	84	28	36
No opinion	8	3	4
	100%	100%	100%

Breakdown By Education	% Who Would Not Object
Adults who have been to college	47%
Adults who have been to high school, but not to college	33
Adults who have been no higher than grade school	33

"What about Negroes who have finished college and want to study advanced courses that are offered nowhere else in Texas except at The University in Austin. Should they be allowed to enter the University?"

	Negroes	Whites	All
Yes, they should	89%	34%	42%
No, they shouldn't	1	60	52
No opinion	10	6	6
	100%	100%	100%

Breakdown by Education	% Who Vote "Yes"
Adults who have been to college	56%
Adults who have been to high school, but not to college	38
Adults who have been no higher than grade school	38

Negroes are included in each Texas Poll in their correct proportion to the white population.

THE 1950 ACT OF THE TEXAS LEGISLATURE REQUIRING SEPARATION OF WHITE AND NEGRO CITIZENS IN THE STATE PARKS [1]

WHEREAS, It has been the policy of the State of Texas to provide separate accommodations and facilities in the system of the State parks; and

WHEREAS, The necessity for such separation still exists in the interest of public welfare, safety, harmony, health, and recreation; and

WHEREAS, The State of Texas desires to continue separate accommodations and facilities for both white and Negro citizens; now, therefore,

---

[1] S. B. 19, Acts 51st Leg., 1st C. S. 1950. The title is omitted in the interest of brevity.

Be It Enacted By The Legislature Of The State Of Texas:

Section 1. Separate facilities shall be furnished in the system of State parks for the white and Negro races, and impartial provision shall be made for both races.

Sec. 2. The State Parks Board is authorized:

(a) To make rules and regulations for the use of the State Parks and the facilities therein by the white and Negro races by providing separate parks or separate facilties within the same parks, on such basis as will furnish equal recreational opportunities and at the same time protect and preserve harmony, peace, welfare, health, and safety of the State and the community;

(b) To close any park or facility or facilities or areas in the State parks where separate equal facilities for the white and Negro races cannot be furnished, and to reopen them when such facilities are available;

(c) (Omitted as not relevant here).

Sec. 3. The fact that the policy of the State in requiring separate park facilities for white and Negro citizens is necessary to preserve the public peace and welfare, and to protect the privileges of both the white and Negro citizens in the use of the State parks; and the further fact that such policy should be set forth by statutory enactment giving additional powers to the State Parks Board to carry out such policy, create an emergency . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948.~~ 1949

No. ~~887.~~ 44

HEMAN MARION SWEATT, *Petitioner*,

v.

THEOPHILUS SHICKEL PAINTER ET AL.

On Petition for Writ of Certiorari to the Supreme Court of the State of Texas.

MOTION AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

THOMAS I. EMERSON
JOHN P. FRANK
ALEXANDER H. FREY
ROBERT L. HALE
HAROLD C. HAVIGHURST
EDWARD H. LEVI

FOR THE COMMITTEE OF LAW TEACHERS AGAINST SEGREGATION IN LEGAL EDUCATION

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MISCELLANEOUS PUBLICATIONS:

Armstrong, A Practicing Lawyer Looks at Legal Education, 9 Am. L. S. Rev. 775 (1940) 26
Boyer, The Smaller Law Schools, 9 Am. L. S. Rev. 1469 (1942) 23, 25
Bradway, A Handbook of the Legal Aid Clinic 27
Flack, The Fourteenth Amendment 10
Garrison, Address, 8 Am. L. S. Rev. 592 (1936) 27
Gifford, Remarks on Placement, 9 Am. L. S. Rev. 1063 (1941) 27
Harvard Univ., Dean's Report, The Law School, 1947-48 27
Houser & Rustin, Journey of Reconciliation 17
Moylan, Selected List of Books for the Small Law School Library, 9 Am. L. S. Rev. 469 (1939) 24
Myrdal, An American Dilemma 18, 30, 31
McPherson, Polit. History of U. S. During Reconstruction 9
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Patterson, The Legal Aid Clinic, 21 Tex. L. Rev. 423 (1943) 27
Sandburg, Abraham Lincoln, The War Years 6
Teacher's Directory, Assn. Amer. Law Schools, 1948-49 25
To Secure These Rights, Report of the Pres. Com. on Civil Rights 22
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Warren, The Supreme Court in U. S. History 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 667.

HEMAN MARION SWEATT, *Petitioner*,

v.

THEOPHILUS SHICKEL PAINTER ET AL.

On Petition for Writ of Certiorari to the Supreme Court of the State of Texas.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the Committee of Law Teachers Against Segregation in Legal Education, respectfully move this Court for leave to file the accompanying brief as Amicus Curiae.

The Committee of Law Teachers Against Segregation in Legal Education was formed for the purpose of expressing the conviction of many law teachers that segregation in legal education is unconstitutional. Membership in the Committee has for the time been restricted to one or two members of each of several law school faculties in addition to those directly responsible for the brief. The membership at the present time is:

Henry W. Ballantine, Berkeley, Calif.
Frederick K. Beutel, Lincoln, Neb.
Thomas C. Billig, Washington, D. C.
Clark M. Byse, Philadelphia, Pa.
Julius Cohen, Lincoln, Neb.
John P. Dawson, Ann Arbor, Mich.
Fred A. Dewey, Cincinnati, Ohio
Allison Dunham, New York, N. Y.
Thomas I. Emerson, New Haven, Conn.
Richard H. Field, Boston, Mass.
John P. Frank, Bloomington, Ind.
Harrop A. Freeman, Ithaca, N. Y.
Alexander H. Frey, Philadelphia, Pa.
Ralph F. Fuchs, Bloomington, Ind.
Carl H. Fulda, Newark, N. J.
A. L. Gausewitz, Albuquerque, N. M.
Robert L. Hale, New York, N. Y.
George S. Harris, Newark, N. J.
Henry M. Hart, Jr., Boston, Mass.
Harold C. Havighurst, Chicago, Ill.
Paul R. Hays, New York, N. Y.
J. Willard Hurst, Madison, Wis.
Jacob D. Hyman, Buffalo, N. Y.
Louis L. Jaffe, Buffalo, N. Y.
George M. Johnson, Washington, D. C.
Harry Kalven, Chicago, Ill.
Wilbur G. Katz, Chicago, Ill.
Frank Kennedy, Iowa City, Ia.
Robert F. Koretz, Syracuse, N. Y.
Franklin C. Latcham, Cleveland, Ohio
Edward H. Levi, Chicago, Ill.
William B. Lockhart, Minneapolis, Minn.
John W. MacDonald, Ithaca, N. Y.
Dougl[illegible] Maggs, Durham, N. C.

W. Howard Mann, Bloomington, Ind.
Robert C. McClure, Minneapolis, Minn.
Cornelius J. Moynihan, Boston, Mass.
Nathaniel Nathanson, Chicago, Ill.
John D. O'Reilly, Boston, Mass.
George E. Palmer, Ann Arbor, Mich.
Herbert O. Reid, Washington, D. C.
Ralph S. Rice, Cincinnati, Ohio
William Gorham Rice, Madison, Wis.
Oliver C. Schroeder, Cleveland, Ohio
Harry Shulman, New Haven, Conn.
Wesley A. Sturges, New Haven, Conn.
Russell Sullivan, Urbana, Ill.
Stanley S. Surrey, Berkeley, Calif.
Henry Weihofen, Albuquerque, N. M.
Willard Wirtz, Chicago, Ill.
Donald Wollett, Seattle, Wash.

The issue presented to this Court in this case is the constitutional validity of segregation in legal education. Teachers of law have so vital an interest in this question that the Committee asks permission to express its views to the Court. To this end the attached brief has been prepared for the Committee.

We have sought the consent of the parties to the filing of this brief. The consent of the counsel for petitioner has been received. The consent of counsel for respondent has not been received. The papers concerning the consents have been filed with the clerk.

THOMAS I. EMERSON
JOHN P. FRANK
ALEXANDER H. FREY
ROBERT L. HALE
HAROLD C. HAVIGHURST
EDWARD H. LEVI

FOR THE COMMITTEE OF LAW TEACHERS AGAINST SEGREGATION IN LEGAL EDUCATION

Washington, D. C., March 30, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 667.

HEMAN MARION SWEATT, *Petitioner*,

v.

THEOPHILUS SHICKEL PAINTER ET AL.

On Petition for Writ of Certiorari to the Supreme Court of the State of Texas.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT

This is an amicus brief in support of a petition for a writ of certiorari to review the judgment of the Texas Court of Civil Appeals (R. 465) affirming a judgment of the District Court of Travis County denying petitioner's request for a writ of mandamus (R. 438, 444). Review has been denied by the Texas Supreme Court (R. 466). The jurisdictional details are contained in the petitioner's brief, and the procedural history of the case appears at R. 438-440.

The essential facts are as follows:

The courts below have denied petitioner's application for a writ of mandamus to compel the appropriate officials of the University of Texas to admit him to its law school. He is concededly in all respects qualified for admission to that school except for the disqualification of race, for Texas bars Negroes from this University (R. 425, 445). The courts below have rejected petitioner's contention that this exclusion, and petitioner's consequent relegation to a state "colored law school", violate his rights under the 14th Amendment.

At the time the record below was made, the colored school was located in Austin, Texas. It has since been moved to Houston (R. 51-52). Petitioner contends however that, for the decision of the issues on which he petitions, the location is immaterial. A principal consequence of the transfer is that the use of the University of Texas (white) faculty members was contemplated while the school was in Austin (R. 454), but a separate faculty is to be recruited for Houston (R. 364, 366, and R. 28-29).

The Texas law school (colored) was set up in response to the order of the district court at an earlier stage of this same litigation (R. 424-433), and it does not appear that there have ever actually been any students in it, either in Austin or in Houston. Sweatt was the first Negro to apply for admission to the Texas law school (white) (R. 451), and in any case Texas concedes that if the colored school ever does operate, it will have very few students (R. 77), starting with a maximum of five or six.

ARGUMENT

The conclusion of the courts below moved from two simple premises. The first is the premise that a state does not violate the 14th Amendment if it segregates the students in its law schools so long as the educational opportunity is "separate but equal". The second is that the

educational opportunity offered the petitioner at Texas (colored) was in fact equal to that which he would have received at Texas (white).

We believe that both these premises are wrong and that the decision below should be reviewed for the following reasons:

1. Segregation violates the 14th Amendment. *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), on which the court below rests, should be overruled.

2. If the *Plessy* case is accepted as good law but is properly interpreted, the decision below conflicts with it. The validity of segregation in education, as distinguished from segregation in transportation with which *Plessy* was concerned, has never been squarely considered by this Court, and should be.

3. Without necessary reference to the foregoing arguments, segregated legal education, with which we are principally concerned, can not possibly meet the test of "separate but equal", no matter what kind of segregated law school Texas may offer its Negro citizens.

4. The central issue, whether broadly viewed as raising the legitimacy of segregation in education, or narrowly as a problem only in the validity of segregation in legal education, is important and should be considered by this Court.

I. Segregation Violates the 14th Amendment.

In the whole sorry history of man's treachery to his own ideals there is no blacker episode than the frittering away of freedmen's rights after the Civil War. That War, granted, represents a composite of a great many motives, some noble and some not. Yet, among those motives was a high moral aspiration, a desire to secure justice to the Negro people. There was real meaning in the observation of Mr. Lincoln to Harriet Beecher Stowe when he said,

upon meeting her, "So you're the little woman who wrote the book that made this great War."[1]

The Constitutional culmination of the Civil War was the Thirteenth, Fourteenth, and Fifteenth Amendments. Again, motives are mixed and we need not define them all. Suffice it to say that among the objects of those Amendments was the maintenance of Negro liberty—a full, complete and practical liberty, to be put beyond the reach of sophistry. Thus, a social revolution, begun by the sword and President Lincoln's Proclamation, was to be carried on by force of law.

So colossal a work took determination.

And then, when the start had just been made, this Court was confronted with the counsel of the men of little courage, the compromisers. The Court was persuaded, and in place of the determination in the 14th Amendment to establish *new* liberties came the deification of "the established usages, customs, and traditions of the people", the solemn denial "that social prejudices may be overcome by legislation." The result was *Plessy* v. *Ferguson*, 163 U.S. 537, 550, 551 (1896), from which these quotations are taken, and a number of similarly dispirited decisions of this Court. With such obeissance to "tradition", a primary part of the 14th Amendment necessarily fell, for if the "tradition" of 250 years of slavery had not been overthrown by a War, a Proclamation, and three Amendments to the Constitution, it had not been overthrown at all.

Plessy v. *Ferguson* held valid against the objection that it violated the Equal Protection clause a Louisiana statute which required separate accommodations for white and colored railroad passengers. Justice Brown for the majority held that this segregation did not stamp "the colored race with a badge of inferiority." If it did so, said he, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." (*Id.*, 551).

---

[1] 2 Sandburg, *Abraham Lincoln, The War Years*, 201.

Justice Harlan had another view of the liberty protected by the 14th Amendment. Because we rest so heavily on the view he expressed, we quote it extensively (pp. 556-559):

> "It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons . . . . The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. 'Personal liberty,' it has been well said, 'consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.' 1 Bl. Com. *134 . . . .
>
> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.
>
> "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case*."

Plessy v. *Ferguson* cannot be squared with the purposes of the 60's and 70's which created the 14th Amendment. It is in fundamental conflict, for example, with *Railroad Co.* v. *Brown*, 17 Wall. 445 (1873). Brown, a Negro, sued for damages for exclusion from a railroad car in the District of Columbia. The authorizing statute for the company, as passed by Congress, provided that "no person shall be excluded from the cars on account of color." The railroad ran two identical cars on the same train, one for Negroes and the other, from which it excluded Brown, for whites. The trial court specifically refused to instruct, as the railroad requested, that if the cars were "equally safe, clean, and comfortable", the railroad should pervail, and Brown won substantial damages for the exclusion.

This Court affirmed, terming the segregation "an ingenious attempt to evade a compliance with the obvious meaning of the requirement." It held that to force the Negro passengers into separate cars was "discrimination", incompatible with the "equality" which Congress had demanded. In short, this Court held that separate but equal accommodations were identical in legal effect with total exclusion of Negroes from transportation. We submit that the *Brown* case is incompatible with the *Plessy* case, and that the *Brown* case is correct.

The *Brown* case, although it does not directly invoke it, reflects the true meaning of the 14th Amendment. Those responsible for the Amendment's enactment rejected the interpretation that Negroes might be segregated. To understand this purpose, not only the direct antecedents of the Amendment but the immediately subsequent Congressional expressions must be studied; and taken together, they give a clear picture:

Laws which give equal protection are those which make no *discrimination* because of race in the sense that they make no *distinction* because of race. As soon as laws make a right or a responsibility dependent solely on race, they violate the 14th Amendment. Reasonable classifications

may be made, but one basis of classification is completely precluded; for the Equal Protection clause makes racial classifications unreasonable per se.

To this interpretation of the 14th Amendment, three episodes are relevant: the enactment of the Civil Rights Act of 1866; the enactment of the 14th Amendment; and the enactment of the Civil Rights Act of 1875.

During the post-Appomattox months of 1865, Southern governments enacted Black Codes which, in the eyes of Northern Congressmen, did much to vitiate the 13th Amendment. These Codes, among other provisions, placed limitations on Negro rights to own property, to institute law suits, or to testify in any proceedings, and applied greatly different penalties to Negroes than to whites for the same offenses.[2]

To prevent these distinctions, Sen. Trumbull of Illinois introduced a Civil Rights Bill forbidding these and related practices and forbidding also in a general phrase all discrimination as to civil rights.[3] He relied on the 13th Amendment as the base of the Act. Sen. Howard, one of the draftsmen of the 13th Amendment, supported the bill. "In respect to all civil rights", said Howard, "there is to be hereafter no distinction between the white race and the black race."[4] And Trumbull said, ". . . the very object of the bill is to break down all discrimination between black men and white men."[5] The bill passed the Senate, but the House worried about the meaning of the general reference to "civil rights". Neither branch of Congress was ready to grant suffrage to the Negroes, and it was explained that this was a "political" and not a 'civil" right. By similar refinement, some thought the school problem and the intermarriage problem involved rights other than "civil".[6]

[2] For a collection of the early post War state legislation, see McPherson, *Political History of the United States During Reconstruction*, ch. IV.

[3] S. No. 61, 39th Cong., 1st Sess.

[4] Cong. Globe, 39th Cong., 1st Sess., 504.

[5] Id., 599.

[6] See, e. g., discussion id., 1117.

These refinements seemed insubstantial to Rep. Bingham, Ohio Republican and member of the Joint Committee on Reconstruction. Bingham thought that "civil rights" included an indeterminate range of rights, and that the 13th Amendment was not sufficient base for such reform. He therefore opposed solely because he felt a further Constitutional Amendment was necessary which would eliminate all "discrimination between citizens on account of race or color in civil rights."[7] Perhaps in part because of his opposition, the bill as finally passed was limited to the named abuses, with the general and vague reference to civil rights omitted. 14 Stat. 27.

The manner in which the Congress, immediately upon passing the Civil Rights Act of 1866, enacted the 14th Amendment is detailed in Flack, *The Fourteenth Amendment*, and was recently considered in connection with other problems under that Amendment in *Adamson* v. *California*, 332 U. S. 46 (1947). All this may be put aside with one observation: Bingham did not repeat the error he thought Trumbull had made in using terms so refined as "civil rights". He carefully chose a more comprehensive term, "equal protection of the laws."

The legislative history of the Amendment itself illumines the general purpose of the Equal Protection clause, but not its details. The Amendment passed both Houses quickly, and the principal disputes were over the second, third, and fourth sections, now largely obsolete. The obvious justice of such phrases as "privileges and immunities" or "equal protection", coupled with the novelty of the other sections, kept the first section of the Amendment outside detailed analysis.[8]

Clearly Congress intended to put the Civil Rights Act of 1866 beyond the reach of possible future hostile legislative hands;[9] but equally clearly, more was intended. Sen. How

[7] Id., 1290, 1293.

[8] A typical example of the generalized treatment of the subject is the statement of Rep. Farnsworth, id. 2539.

[9] See for example the comments of Rep. Stevens, in reporting the Amendment to the House, id. 2459.

ard, floor leader for the Amendment in the Senate, said "It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same protection before the law as it gives to the most powerful; the most wealthy, or the most haughty."[10] He explained that it "abolishes all class legislation in the States," Sen. Howe, Wis., listed the civil rights specified in the 1866 Act, but added, "These are not the only rights."[11] He denounced in detail a discrimination in Florida in education between whites and blacks, though without explicit consideration of segregation, and gave that abuse as the sort of supplemental evil, beyond those specified in the Civil Rights Act, which the Amendment forbade.

Thus the Amendment was enacted with what are today two relevant sections, the first, which made unconstitutional certain practices such as the denial of equal protection; and the fifth, which authorized Congress to legislate in support of the first. As new discriminations began to flourish wide-spread, Congress almost immediately upon ratification of the 14th Amendment began to consider such legislation. The response was the Civil Rights Act of 1875, which Sen. Sumner of Massachusetts sponsored and carried through to the passage it won just after his death.

The core of the bill as Sumner sponsored it was the prohibition of discriminations because of race in conveyances, theaters, inns, and schools.[12] Furthermore, there is no possible doubt but that every person who voted for the bill in its various presentations over a several year period knew exactly that the bill prohibited "separate but equal" accommodations or facilities or schools, for the bill's sponsors were categorically explicit. It would be superrogation to accumulate the number of times the point was clearly made. Sumner's theory was simple: Lord Chief Justice

[10] Id., 2766.

[11] Id., App., 217, 219.

[12] The measure was proposed by Sumner both as a bill and as an amendment to other bills over a period of years. Its final presentation was in the 43rd Cong., S. 1.

Holt, in *Smith* v. *Gould*, 2 Ld. Ray. 1274 (1706), had said, "The common law takes no notice of Negroes being different from other men."[13] Some pre-civil war judicial decisions had taken another view—Sumner himself had lost the case of *Roberts* v. *Boston*, 5 Cush. 198 (1850), in which he had argued for non-segregated schools in Massachusetts, though he won the same battle by legislation soon after. But the 14th Amendment made Holt's principle the law.

For the argument of equality through separation Sumner had only scorn:

> "Then comes the other excuse, which finds Equality in separation. Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the artificial substitutes for Equality; and this is the contrivance by which a transcendent right, involving a transcendent duty, is evaded. . . . Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instinct with the spirit of Slavery, and this decides its character. *It is Slavery in its last appearance.*"[14]

In the debates which followed, the leading cases on which this Court relied in *Plessy* v. *Ferguson* were pressed upon the Senate and rejected as unsound. *Roberts* v. *Boston*, supra, was quoted without avail.[15] A contemporary Ohio decision, *State* v. *McCann*, 21 Ohio St. 198 (1872), which held that separate schools were adequate, was rejected by name before these men who knew the 14th Amendment best.[16]

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[13] Cong. Globe 385, 42nd Cong., 2nd Sess.

[14] Id., 382, 383. Emphasis added.

[15] See remarks of Sen. Casserly, id., 3261.

[16] Sen. Ferry, opposing the bill, relied on the *McCann* case, id., 3257; At the time of its final consideration, Sen. Frelinghuysen, in charge of the bill in the Senate, explained why he thought the *McCann* case should not control. 2 Cong. Rec. 3452, 43rd Cong., 1st Sess.

The debates on the Sumner bill over a period of years caused a searching analysis of the 14th Amendment by some of the leading constitutional lawyers of our history. They made the point over and over again that the Amendment forbade *distinctions* because of race. As Sen. Edmunds of Vermont, later chairman of the Senate Judiciary Committee put it when he rejected separate schools: "This is a matter of inherent right, unless you adopt the slave doctrine that color and race are reasons for distinction among citizens."[17]

The bill started its final road to passage in the 43rd Congress. As Sen. Sumner had died, Sen. Frelinghuysen of New Jersey led the debate for the bill, beginning on April 29, 1874, with an extensive argument that segregation was incompatible with the 14th Amendment. The bill, he said, sought "freedom from all discrimination before the law on account of race, as one of the fundamental rights of United States citizenship."[18] For this he found full warrant in the Equal Protection clause.

Frelinghuysen conceded some difficulty in respect to inns and conveyances because these were not directly state-operated, and the states alone were limited by the Amendment. Cf. The *Civil Rights Cases*, 109 U. S. 3 (1883). But the case of public schools he considered utterly obvious since these were state agencies: Segregation in the schools could only be voluntary, for "The object of the bill is to destroy, not to recognize, the distinctions of race."[19]

There were in the Senate three distinct views on the problem of segregated schools. A minority thought that "separate but equal" schools should be permitted. On May 22, 1874, an amendment to that effect offered by Sen. Sargent of California was rejected, 26 to 21. Thus 26 Senators clearly conceived of separate but equal schools, if established by force of law, as a violation of the 14th

17 Cong. Globe, 42 Cong., 2d Sess. 3269.
18 Id., 3451.
19 Id., 3452.

Amendment. That 26 included Sens. Morrill, Conkling and Boutwell who had been on the Committee which had drafted the Amendment.

The 26 were not themselves of one mind. Sen. Boutwell represented a small minority view that separate schools necessarily bred intolerance and therefore should not be allowed to exist even if both races desired it.[20] However the dominant Senate opinion was that separate schools should be forbidden by law, as the Amendment and this bill forbade them; but that if the entire population were content in particular instances to accept separate schools, it might do so. Sen. Pratt of Indiana, one of the most vigorous supporters of the bill, noted that Congress was continuing separate schools in the District of Columbia because both races were content with them; and at the same time he pointed out that where there were very few colored students, they would have to be intermingled.[21] Sen. Howe put it most concretely when he observed that if, by law, schools were permitted to be separate, they would never in fact be equal. He believed in prohibiting separate schools and then letting people do as they chose: "Let the individuals and not the superintendent of schools judge of the comparative merits of the schools."[22]

We conclude that the Senators who voted for this bill, which had been completely discussed in terms of the very constitutional issue now presented, thought that "separate but equal" violated the 14th Amendment. This was a contemporary judgment by those who framed the Amendment, and their associates. That contemporaneous judgment is entitled to great weight here. *McPherson* v. *Blacker*, 146 U. S. 1, 27 (1892).

The House record is less clear. The bill passed there

20 "If it were possible, as in the large cities it is possible, to establish separate schools for black children and for white children, it is in the highest degree inexpedient to either establish or tolerate such schools." From speech of Sen. Boutwell, id. 4116.

21 Id., 4081, 4082.

22 Id., 4151.

with the clauses as to carriers, inns, and non-discrimination as to jurors intact, thus attempting to eliminate segregation as to them; but the school clause was deleted. 18 Stat. 335. The various elements of opinion responsible for the deletion were so commingled as to make it difficult to know which dominated. There were in the first place the same three blocs as in the Senate: (a) those who wished to permit separate schools; (b) those who wished to forbid separate schools except where they were voluntarily accepted by both races; and (c) those who wished to forbid separate schools even where they were desired. In addition Southerners repeatedly told the House that if common schools were required by law, with heavy penalties attached for violation, public schooling would come to an end in the South.[23] Such schooling was a post-war phenomenon entirely in most of the South, which had previously relied on private academies; and it would have been simple to abandon public schools.

Faced with this division of opinion, Rep. Cain, a South Carolina Negro, in a crucial address which dominated the debate, stated that he was willing to eliminate the school clause to insure getting the rest of the bill. He explained that he strongly preferred the original Sumner proposal, but that on the other hand he would prefer elimination of the entire subject to any statutory approval of "separate but equal". Since in his judgment the Negroes in his state were satisfied for the moment with their own schools and did not at the moment want mixed education "except the state college," he preferred not to risk a vote on separation.[24]

Rep. Monroe supported the Cain position, and purported to summarize what his colored advisers had told him: "They think their chances for good schools will be better

[23] See typically remarks of Rep. Roberts, who stated that he preferred to include a prohibition of segregated schools in the bill, but would vote to omit the clause for fear that all schools might be abolished. 3 Cong. Rec. 981, 43rd Cong., 2d Sess.

[24] Id., 981.

under the Constitution with the protection of the courts than under" such legislation as that permitting separate schools.[25]

The House of Representatives thus chose as a matter of policy not to pass the Senate bill which attached criminal penalties to the maintenance of segregated schools as well as segregated carriers and inns. But though it eliminated the schools, it kept the same judgment as the Senate that segregation denied equal protection, for the House forbade it as to some of the same objects. The rest, as Rep. Monroe put it, was left to the courts without criminal penalties.

We ask that this Court extend the same judgment as these authors of the Amendment: that the Equal Protection clause obliterates distinctions based on race.

In view of *Railroad Co.* v. *Brown*, supra, and the contemporary interpretation of the Amendment, how account for *Plessy* v. *Ferguson?*

The *Plessy* case was an integral part of a group of cases which had as their object the deliberately narrow construction of the War Amendments. There is no need to repeat here the story of the process by which the Negro was largely read out of the Negro's Amendments. Certainly what the Court did has been often applauded. As Warren puts it of the entire group of such cases, ". . . the decisions in these cases were most fortunate. They largely eliminated from National politics the Negro question which had so long embittered Congressional debates; they relegated the burden and the duty of protecting the Negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States." 2 Warren, *The Supreme Court in United States History*, 608.

We challenge the basis of policy which earns such applause. This Court was not free to relegate the Negro to the mercies of the states of his slavery, nor to restore confidence in itself by any such means. The Court was not

[25] Id. 997, 998.

free to substitute a different policy for that written into the 14th Amendment.

In any case, the Court's policy judgment was unsound. The obvious underlying theory of *Plessy* was that it was "impossible" to prevent segregation if the dominant community group desired it, and that the Constitution must bow to the inevitable. See particularly pp. 551, 552. Time has proved that judgment unsound.

(a) This Court is not as ineffective as the *Plessy* Court assumed. Where this Court has acted against discriminations, it has usually had at least some beneficial effect. Of course a judgment from this tribunal is not a magic wand before which tensions vanish, but with such judgments, progress can be made. *Buchanan* v. *Warley*, 245 U. S. 60 (1917), had some substantial effects though new devices were utilized to cause some of the same results. Cf. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). *Morgan* v. *Virginia*, 328 U. S. 373 (1946), has made at least some contribution toward an end closely related to the instant case;[26] and *Smith* v. *Allwright*, 321 U. S. 649 (1944), announced a rule which has operated with substantial success. As the record in the instant case shows, segregation in the law school at the University of Maryland ended because of judicial compulsion, and the subsequent experience has been satisfactory (R. 290).

The point is that while this Court cannot bring the millennium by its fiat, it can take short but significant steps in the right direction. The hopeless throwing up of hands typified by the *Plessy* case was unjustified by judicial experience before or since.

(b) The failure to apply the Constitution because of the *Plessy* notion that it is better policy to let events take their course makes the situation worse. Nonaction has its own

[26] For one thoughtful and factual analysis of the consequences of the *Morgan* case, see Houser and Rustin, *Journey of Reconciliation*, a report of a test trip made by the Fellowship Reconciliation in 1947. This is a pamphlet published by the Fellowship.

consequences. The drift is not, as the *Plessy* majority seemed to hope, in the direction of living in brotherhood, but rather away from it. Segregation grows more extreme and progressively more absurd as ingenious minds search for new ways to be "separate but equal."[27] As the most discerning student of the subject has noted, what was merely segregation forty years ago is becoming a caste system today. 1 Myrdal, *An American Dilemma*, 644-650.

The nineteenth century decisions of this Court, though not alone responsible, must bear some responsibility for the degradation of the Negro to the bottom of our society. Cf. Myrdal, supra, 628-630.

The prediction of Justice Harlan in the *Plessy* case has been borne out by the event, p. 560:

> ". . . The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficient purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution. . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?"

We submit that when the *Plessy* majority "bowed to the inevitable," it bowed too soon. Such decisions by this Court themselves hastened, as Justice Harlan said they would, the very ends to which the Court yielded.

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[27] Cf. *Bynn* v. *Atlanta*, 67 Ga. App. 147, 19 S. E. 2d 553, cert. den. because out of time, 317 U. S. 666 (1942).

The 14th Amendment as a charter of protection for Negroes surely deserved interpretation aimed at securing its objects. This required a full recognition of what those objects were. Decisions like *Plessy* v. *Ferguson* have casually eliminated from the history of the 1860's the drive to eliminate Negro misery symbolized in Mr. Lincoln's comment to Harriet Beecher Stowe. Such a decision made of the 14th Amendment a cosmic mistake. As Sen. Frelinghuysen said in presenting the anti-segregation Civil Rights Bill of 1875 to the Senate.

> "If, sir, we have not the Constitutional right thus to legislate, then the people of this country have perpetrated a blunder amounting to a grim burlesque over which the world might laugh were it not that it is a blunder over which humanity would have occasion to mourn. Sir, we have the right, in the language of the Constitution, to give 'to all persons within the jurisdiction of the United States the equal protection of the laws.' "[28]

We contend that the Equal Protection clause forbids distinctions because of race, and that state-enforced segregation is therefore unconstitutional because it makes such a distinction. As Sen. Edmunds put it, it is "slave doctrine" to make color and race reasons for distinctions among citizens. Segregation *is* discrimination, *Brown* v. *Railroad*, supra.

II. Segregation Should Not Be Extended to Education.

Plessy v. *Ferguson* involved segregation on common carriers. It carefully did not endorse segregation generally. It was urged in argument that if segregation on carriers were valid, states might require white and colored persons to use different sides of the street, or paint their houses or business signs different colors, on the ground that one side of the street or one color was as good as another. Such

[28] 2 Cong. Dec. 3451, 43rd Cong., 1st Sess.

action, the Court said, would be invalid, holding that even segregation must be "reasonable." p. 550.

Though this court has held that segregation of whites and Negroes to different blocks in a city is unreasonable, *Buchanan* v. *Warley*, 245 U. S. 60 (1917), it has never squarely faced the question whether segregation in education is unreasonable. If segregation laws are to be permitted in the casual affairs of life, such as riding on streetcars, but are invalid when applied to such fundamental matters as establishing a home, the question becomes one of whether the undisputed right to equal education falls within the first category or the second.

This is not to say that the problem of the validity of segregation in education has never been referred to in the opinions of this Court, but rather that it has never been seriously argued or deliberately considered. In *Berea College* v. *Kentucky*, 211 U. S. 45 (1908) the issue was the validity of a Kentucky statute forbidding the teaching of Negroes and whites in the same college. The sole question raised and decided was that such a statute was not a violation of due process as an interference with the property rights of the educational corporation. The question of the rights of individuals was carefully put aside, p. 54, and the equal protection problem was not involved. In *Cumming* v. *Board of Education*, 175 U. S. 528, 543 (1899), the court in so many words excluded the legality of segregation in education from its decision. Yet in *Gong Lum* v. *Rice*, 275 U. S. 78 (1927) the court treated segregation in education as legitimate on the basis of the *Plessy* and *Cumming* cases despite the fact that the basic problem was not argued in the *Gong Lum* case and that it was neither involved in *Plessy* nor decided in *Cumming*.

The result is that if segregation in education is legal, it is a rule of law that came from no place. So vital a matter should not have rested on dicta without either argument or consideration. *Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337, 344 (1938) did observe that segregated education

had been "sustained by our decisions." But the cases cited had not in fact considered the precise point and that matter was not involved in the *Gaines* case, which decided only whether a particular type of separation in education was "equal." Nor does *Sipuel v. Bd. of Regents*, 332 U. S. 631, and 333 U. S. 147 (1948), add anything on this point.

If we accept arguendo the *Plessy* case, with its distinction between "reasonable" and "unreasonable" types of segregation, we must place segregated education into the category of the "unreasonable." Segregated transportation is at least of shorter duration, and it is fairly easy to determine whether the proffered alternatives in transportation are in fact equal.

Segregated education has more severe consequences. Even if it is equal, it has psychological effects, effects which blast lives forever:

> "Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience. . . . Experience with segregation of Negroes has shown that adjustments may take the form of acceptance, avoidance, direct hostility and aggression, and indirect or deflected hostility. In seeking self expression and finding it blocked by the practices of a society accepting segregation, the child may express hatred or rage which in turn may result in a distortion of normal social behavior by the creation of the defense mechanism of secrecy. The effects of a dual school system force a sense of limitations upon the child, and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy, and discourage racial self-appreciation."[29]

Independently of its consequences on individuals, segregated education belongs in the "unreasonable" category created by *Plessy* because of the impossibility in fact of securing or policing that equality which *Plessy* assumes

[29] Note, 56 Yale L. Jour. 1059, 1061 n. (1947). The Note contains abundant citations to scientific works in support of the passage above.

must exist. Fifty years of experience teaches that separate education virtually never is equal. As the President's Committee on Civil Rights reported:

> "With respect to education, as well as to other public services, the Committee believes that the 'separate but equal' rule has not been obeyed in practice. There is a marked difference in quality between the educational opportunities offered white children and Negro children in the separate schools."[30]

A system which has thus so obviously permitted discrimination in virtually every schoolhouse in which it exists ought to be re-examined from its root.

III. Segregated Legal Education Necessarily Violates the Fourteenth Amendment.

To this point, we have challenged the legality of segregation generally, and particularly in education. But it is perhaps unnecessary to go so far. Petitioner wants to go to the University of Texas Law School. The courts below have concluded that the segregated school is "separate but equal", and therefore legitimate. We contend that Texas can have no such thing as a segregated law school for Negroes which is equal to its white law school.

In making this argument, we are safely within the boundaries of all precedents, and *Plessy* v. *Ferguson* becomes our direct support. In any interpretation, that case requires equality if segregation is to be permitted, and we contend that there could not possibly be equality here.

The precise point has not been decided by this Court. In the *Gaines* case, supra, there was no legal education offered Negroes in Missouri, and the Court therefore was required to hold only, as it did hold, that equal facilities must be furnished within the borders of the State. In the *Sipuel* case, supra, the majority found that the question whether "separate" legal education could be "equal" was not properly presented to it.

[30] "To Secure These Rights", 63, *the Report of the President's Committee on Civil Rights.*

In the *Sipuel* case, supra, sub nom. *Fisher* v. *Hurst*, 333 U. S. 147, Mr. Justice Rutledge disagreed with his brethren on the procedural issue, and thus could reach the question we have here. Mr. Justice Rutledge observed that the equality required is "equality in fact, not in legal fiction. Obviously no separate law school could be established elsewhere overnight capable of giving petitioner a legal education equal to that afforded by the state's long-established and well-known state university law school."

Freed of the procedural barrier in the *Sipuel* case, we reach Mr. Justice Rutledge's point in this case. We contend that if equality is "equality in fact, not in legal fiction", then there is nothing that Texas could possibly show which would establish that this over-night law school, after its sudden appearance in Austin and quick move to Houston, could equal the University of Texas (white). In addition to all the limitations implicit in its "overnight" quality, the school will have almost no students (R. 77), and cannot have any of the other attributes necessary to equality. The testimony of Dean Earl Harrison of the University of Pennsylvania Law School (R. 216-223) and Professor Malcolm Sharp of the University of Chicago Law School (R. 341-351) fully support this contention.

"Though Mark Hopkins and a log needed only a student to make a university, law schools are not created in any such fashion, or with such ease."[31] It is our contention that, if we free ourselves of preoccupation with externals and go to the substance of legal education, a separate school for a handful of Negroes in Texas cannot conceivably, under any circumstances, be equal to the state law school for whites.

In a number of cases, state courts and lower federal courts have reviewed segregated educational systems in particular areas and have decided that particular systems

[31] Dean B. F. Boyer, Univ. Kans. City Law School, *The Smaller Law Schools: Factors affecting their methods and objectives*, 9 Am. Law School Rev. 1469, 1472 (1942). The Texas view is the opposite (R. 20).

either were or were not equal. From that body of case law, however, emerges only an approach largely inapplicable to legal education. Grade schools and high schools perhaps can be compared on the basis of physical plant, or teachers' salaries, or types of plumbing, or number of students per class, or variety of courses offered;[32] but these mechanical approaches to legal education tell only a partial story. This is not to say that law schools defy comparison, but rather that standards applicable to grade schools or high schools have very little relevance to such comparison.

The necessary factors of inequality can be divided into two types. First are those factors which are limitations always plaguing very small schools but of which Texas could, conceivably but not practically, buy its way free. Second are those factors of limitation from which no amount of money can purchase escape. These might be termed, for easy reference, actual factors of inequality and actual and inescapable factors of inequality. A summary of some of their ingredients, even more apparent at the Houston than at the Austin school, follows:

A. Actual Factors of Inequality.

1. One of the essential ingredients in the rating of a law school is the size of its library. Texas Law School (white) has 65,000 volumes of which 30,000 to 35,000 are not duplicates (R. 455). Texas is obtaining for its colored school 10,000 volumes, the bare minimum permitted by the American Law School Association (R. 456). Utilizing pre-war, pre-inflation standards, it would cost Texas something over $100,000 to obtain a library equivalent in size to the non-duplicate list of the white school.[33] This is $100,000 which Texas shows no present intention of spending, and as a

[32] For a collection of cases decided for and against Negroes in terms of size of school, value of school property, location of school, length of term, number of teachers, etc., see 103 A. L. R. 713. For a similar approach by Texas in this case, see R. 78.

[33] The calculation is based on Moylan, *Selected List of Books for the Small Law School Library*, 9 Am. Law School Rev. 469 (1939), and the testimony of Hargreaves, Texas (white) librarian (R. 142).

practical matter only a large staff of diligent librarians could find such a collection of books during the period in which petitioner would get his legal education.

2. While faculty size is not, once a certain number is obtained, a controlling measure of a school, the size has great relevance when the number is very small. Texas contemplates a faculty of four at the Negro school (R. 454), and in the current year lists 26 faculty members at its white school.[34] Since there will be very few students at the colored school, the proportion of time given by faculty members to students may be higher there; but since each of the four must be a jack of all trades instead of a specialist in any field, his counsel will, by modern standards of legal education, be of less value to his students than would be the case if he were an acknowledged specialist.

3. Apart from faculty size, faculty quality can not be equal. The primary and secondary school cases cited above treat teachers as though they were so many interchangeable units of educational machinery, and hence can compare teachers by quantity. Assuming arguendo the validity of that approach to grade schools, law teachers are certainly not thus fungible. The very small schools do not have the same opportunity as those larger to obtain professors of equal distinction. For one thing, the small library and the elimination of the opportunity for specialization keeps the best prospective teachers—usually—from staying in the smallest schools if they go to them at all.[35] At Texas (white) are many professors with names great in legal education. It is beyond belief that Texas (colored) could at any time in the predictable future acquire the services of their equals.

4. The course offerings at the colored school will necessarily be sharply limited by the size of the faculty and

[34] Teachers' Directory, Association of American Law Schools, 1948-49, p. 16. The number was 21 when this record was made. (R. 369).

[35] These problems are well discussed in Beyer, supra, n. 31.

the size of the library. Even the staples cannot be offered every year. Texas (white) offers 66 courses in the current year.[36] Texas (colored) would give 16 if each of its proposed four faculty members taught four different subjects.

In fact, the foregoing factors of inequality cannot be surmounted, even with the most lavish expenditure of money, in any short time. But assuming that money could cure those defects, and that Texas will pay without restraint for the luxury of its prejudices, it can still not give separate but equal legal education to Heman Marion Sweatt.

B. Actual and Inescapable Factors of Inequality.

1. Legal education as it is now conducted assumes that classes will be large enough for full discussion of divergent points of view. This does not mean that classes must be large in an absolute sense, but Texas (colored) cannot measure up for two reasons: (a) there must be at least enough students to make a sample large enough to include a few good ones; (b) there must be in the group a divergency of points of view. The very class division which causes Sweatt to be segregated precludes that kind of divergency in at least some areas. Nor can the faculty which will accept posts in a segregated school be expected to represent the range of the spectrum of ideas. As Mr. Walter P. Armstrong, a former president of the American Bar Association, has said of the work of the American Law Institute, "From the thrust and parry, the give and take of earnest but good-natured debate something emerges that in essence at least is satisfactory to all."[37] The present method of legal education depends entirely upon that thrust and parry which cannot exist in a "school" of a handful of segregated students.

2. Education outside the classroom, as in the classroom, depends on the discussion of the group. Michigan and Yale

[36] University of Texas Law School Catalogue, Aug. 1, 1948, p. 25 *et seq.*

[37] Armstrong, *A Practicing Lawyer Looks at Legal Education*, 9 Am. Law School Rev. 775, 781 (1940). See R. 217-221, Ex. 343.

house their law students together and Harvard is proposing a vast new construction program.[38] While other schools may not be able to keep their students in a group twenty-four hours a day, every teacher knows the value of the intense discussions after classes in the corridors and lounges of a modern law school. When Texas consigns Sweatt to a law school in which he has virtually no one else to talk to, it deprives him of one of the most stimulating parts of modern legal education.

3. The lack of a substantial group of fellow students cuts in other directions. One of the most vital parts of modern legal education is a law review. Texas (white) has an excellent review on which its best students may aspire to serve. Texas (colored) cannot possibly have a law review for lack of a sufficient number of topnotch students to man it. Cf. R. 105, 310-313, 347.

4. Modern law schools have moot court programs in which students are trained by actual practice in either appellate work or trial work or both. This program, to a somewhat lesser extent than the law journal, is dependent on the presence of an interested group. The most successful programs are operated as competitions within groups. See R. 102.

5. Other practice work is done through legal aid programs. This cannot be done unless there is a sufficient group of competent students to manage and supervise the novices, after the fashion of the law journal.[39] Texas (white) offers work for credit in legal aid. It will be difficult, if not impossible, for Texas (colored) to emulate that program.

6. The study of legal ethics will be handicapped by the loss of daily association with a substantial number of other

[38] Dean's Report, The Law School, Harvard University, 1947 JS. 2.

[39] For a description of the work of the Texas (white) legal aid program see Patterson, *The Legal Aid Clinic*, 21 Tex. L. Rev. 423, 426-429 (1943); and for further description of a legal aid program see Bradway, *A Handbook of the Legal Aid Clinic* (S. Cal.), ch. III (1950, mimeo). See also R. 104.

law students. Training in legal ethics involves something more subtle than admonitions against commingling trust funds. As Mr. Lloyd Garrison has observed:

> "Thus in classrooms, dormitories, clubs and playing-fields the student gets to know not a handful of neighborhood acquaintances but a cross-section of his contemporaries, drawn from innumerable localities and environments and varying widely in capacities and tastes. He will note them all, and in the activities and competition of the communal life he will perceive the various gradations of excellence which that life reveals in his fellows, and will desire increasingly to resemble those who stand out as the most admirable. In the same manner he will judge his teachers, and will be drawn slowly but certainly to those whose qualities of mind and character shine the most luminously." Dean Garrison continues to say that: "There is in law school as in college the same health-giving association of student with student, and of student with professor, but the personnel and range of contacts are necessarily smaller, and the absorption and professional study necessarily more confining."[40]

The student of Texas (white) will imbibe the lessons of character from a far larger proportion of that "cross section of his contemporaries" to which Garrison refers than would Sweatt at Texas (colored).

7. By sending Sweatt to a raw, new law school without alumni or prestige, Texas deprives him of economic opportunity which its white students have. Lawyers know that professional opportunities may be the result of the reputation of the institution in which a man is trained, and certainly the alumni are vital links in student placement.[41] Sweatt would graduate from Texas (colored) without equal opportunity in respect to making a living.

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[40] Garrison, Address, American Bar Assn. Sec. on Legal Educ., Boston, 1936, in 8 Am. Law School Rev. 592, 594 (1936).

[41] Assoc. Dean James P. Gifford, Columbia University School of Law, in an extensive report on placement method observed, "Practically all schools use their alumni as sources of information about openings." 9 Am. Law School Rev. 1063, 1066 (1941). Dean Gifford also discussed the value of moot courts, dinners, and speeches as placement aids.

8. Another economic disadvantage of consigning Sweatt to Texas (colored) is the loss of opportunity to become acquainted with a number of lawyers with whom he must inevitably one day practice. We cannot assume that were Sweatt to be enrolled at Texas (white), all the students would refuse to associate with him, or that, if his merit deserves it, he might not make friends. He is at least entitled to the equal opportunity to try. For the entire remainder of his life he will be in a profession in which business may be referred from a friend in one city to a friend in another, in which stipulations in cases will be made easier because of previous contacts among lawyers—in short, in a profession in which it is an enormous advantage to have a substantial number of classmates scattered about the state. At Texas (colored), Sweatt would lose the opportunity white students have of forming such friendly relationships.

In sum, in countless ways separate legal education cannot be equal legal education. Only if legal education is nothing more than a matter of cubic feet of classroom space, or the possession of a few thousand books, or the presence of four lawyers recently become teachers can Texas (colored) be considered equal to Texas (white). If instead legal education is something alive and vital; if the measure is not cubic feet of air space but the intellectual atmosphere within the walls; if law teachers are appraised as individual men of varying degrees of talent; if education is in large part association; if research and practice are part of the job of legal training—if any of these things, then certainly Texas (colored) is a mockery of legal education and of the equal protection of the laws.

IV. The Question is Important.

The decision below, in addition to being in conflict with the Constitution and with decisions of this Court, is of grave importance.

It is important to avoid the waste, not only in dollars but in human energy, resulting from the creation of the segregated law schools in the South since the *Gaines* case. If petitioner is right, these schools are purposeless. If petitioner is wrong, the doubts concerning those schools should be removed.

It is important that Negroes have an equal opportunity to become lawyers.

1. It is important to the particular Negroes themselves involved, and to their families. If they have the ability to rise above the cotton picking, the manual labor, and the domestic service to which our white society has consigned their race, it is almost as important to them as life itself that they have the opportunity to do so.

2. It is important to the rest of the Negro community. As Myrdal says in 2 *An American Dilemma* 804, 805, of the advantage to the whole group of having Negro business and professional men:

> "... The chief advantage is the tiny Negro business and professional class itself, which lives by providing goods and services to Negroes. It is this class which has the education and leisure necessary to articulate the Negro protest and to take up successful collective bargaining with white society.
>
> "In the long run, this class can be depended upon to voice the interests of the broad masses of Negroes, simply because its own interests are convergent with those of the masses of Negroes. The Negro preacher, doctor, lawyer, journalist, real estate dealer, insurance man, banker, mortician, and retail merchant has his business founded upon Negro purchasing power. If he serves only the upper strata, his interests are, nevertheless, indirectly tied to the interests of the masses, as the majority of his customers live off the common Negroes. He might sometimes exploit the masses mercilessly. But fundamentally he must want the Negroes to get employment and good pay or, if employment shrinks, he must want them to get public relief, because otherwise he will fail himself.

"He must want the common Negroes to have the vote, because otherwise he will be less protected himself. He must want justice, because a prejudiced police and court system is a danger to him too. And when he fights against the humiliations of the Jim Crow system, which hurt him more than the Negro masses, even this is in the long run to the advantage of all Negroes. That there are exceptions and conflicts of interest is not denied. But neither should it be concealed that, in the main, the Negro masses can rely upon their upper class people to wage a fight that is in their interest."

3. It is important to the American people, not only in terms of the application of general principles, but in tangible matters of our moral position in the world. As the Legal Adviser to the Secretary of State advised this Court in connection with the *Restrictive Covenant Cases*, "The United States has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country."[42]

The treatment of our Negro minority is a moral responsibility of the white majority, and it is important that the American conscience be freed of wrongdoing. This Court, as the expounder of the Constitution, is one of the custodians of that conscience. As Myrdal, p. 582, says in concluding his discussion of "The Jim Crow Laws", the Negro "has in his demands upon white Americans, the fundamental law of the land on his side. He has even the better conscience of his white compatriots themselves. He knows it; and the white American knows it, too."

---

42 Brief for United States, p. 19, *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

CONCLUSION

We respectfully submit that the petition for certiorari should be granted.

THOMAS I. EMERSON
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. ~~1948~~ 49

No. ~~607~~ 771

HEMAN MARION SWEATT,
Petitioner,

vs.

THEOPHILUS SHICKEL PAINTER, ET AL.,
Respondents.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

ARTHUR J. GOLDBERG,
General Counsel.

THOMAS E. HARRIS,
Assistant General Counsel.

THE BYNTHROP WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 667.

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILUS SHICKEL PAINTER, ET AL.,

Respondents.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

The Congress of Industrial Organizations files the within memorandum on behalf of its members because this case involves the constitutionality of state-compelled segregation in education—a practice which has crystallized thinking in the narrow mold of racial prejudice. That distinctions based on race alone are inimical to the best interests of our country, and therefore to the functioning of a free, non-discriminatory labor movement, is recognized by the Preamble to the Constitution of the Congress of Industrial Organization: —

> "Racial persecution, intolerance, selfishness, and greed have no place in the human family."

This brief manifests the belief expressed in the Preamble as it applies to the validity of state requirements of educational segregation.

"Pressing Need for a Definitive Decision by This Court."

For the first time this Court is squarely confronted with the question whether segregation in education, based solely on differences in race, satisfies the Fourteenth Amendment's requirement of "equal protection of the laws." The need for a clear-cut answer by this Court cannot be overemphasized. Prolonged litigation and large expenditures, both by individual petitioners and by states practicing segregation, have been the direct result of the present uncertainty as to the constitutional status of that practice. Negro petitioners have sought judicial relief in eight[1] of the seventeen states which provide for separate school facilities by statute or constitution. Largely as a result of the present suit, the Texas legislature has appropriated $3,000,000 for separate Negro education—fully one-half the total expenditure for Negro education in the state during the preceding third of a century.[2] And plans for regional professional schools, obviously aimed to espouse the doctrine of "separate equality", have been con-

1. *Johnson* v. *Board of Trustees*, No. 625 (D. C. E. D. Ky., 1949); *Louisiana ex rel. Hatfield* v. *Louisiana State University*, No. 25,520 (La., 19th Jud. Dist., 1949); *Pearson* v. *Murray*, 169 Md. 578, 182 At. 590 (1936); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Bluford* v. *Canada*, 32 F. Supp. 707 (Mo., 1940), app. dism. 119 F. 2d 779 (C. C. A. 8th, 1941); *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948); *Fisher* v. *Hurst*, 333 U. S. 147 (1948); *McLaurin* v. *Oklahoma State Regents*, No. 614 (U. S. S. Ct., 1949); *Wrighten* v. *Board of Trustees*, 72 F. Supp. 948 (S. C., 1947); *State ex rel. Michael* v. *Whitham*, 179 Tenn. 250, 165 S. W. 2d 378 (1942); and the present case.

2. Bullock, The Availability of Education in the Texas Separate Schools, 16 J. Negro Ed. 425, 432 (1947); see Wirth, the Price of Prejudice, 36 Survey Graphic 19, 20 (Jan., 1947).

sidered at length by the states involved.[3] This Court's decision on the merits of the issue is essential so that the need for successive court action may be ended, and so that *projected* economic plans cannot become *actual* financial outlays which may serve even as a makeweight factor in the result reached.

Segregation in Education—A Question of First Impression in This Court.

In *Plessy* v. *Ferguson*, 163 U. S. 537, 550-51 (1896), a state statute requiring racial separation in public carriers was held constitutional. This Court enunciated a test of "reasonableness" and then stated:

> "Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which *does not seem to have been questioned*, or the corresponding acts of state legislatures [italics added]."

Nothing was added to this dictum in *Cumming* v. *Richmond County Board of Education*, 175 U. S. 528, 543 (1899), in which Justice Harlan carefully pointed out:

> "But we need not consider that question [the constitutionality of the requirement that the white and colored children of the state be educated in separate schools] in this case. No such issue was made in the pleadings."

Nor did *Berea College* v. *Kentucky*, 211 U. S. 45 (1908), touch the basic problem.

[3] See Ball, Constitutionality of the Proposed Regional Plan for Professional Education of the Southern Negro, 1 Vanderbilt L. Rev. 403 (1948).

Thus the opinion in *Buchanan* v. *Warley*, 245 U. S. 60, 81 (1917), accurately stated the constitutional standing (or lack of it) of segregation in education:

> "As we have seen, *this court* has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and *courts of high authority* have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given [italics added]."

But dictum assumed the respectability of doctrine only ten years later. In *Gong Lum* v. *Rice*, 275 U. S. 78, 85 (1927), Chief Justice Taft asserted:

> "Were this a new question it would call for very full argument and discussion, but we think that it is the same question which has been many times decided to be within the constitutional power of the State legislature to settle without intervention of the Federal Courts under the Federal Constitution."

To sustain this proposition the Chief Justice invoked only one Supreme Court decision—the dictum of the *Plessy* case.

Then, in *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 344 (1938), the statement quoted from *Buchanan* v. *Warley* was wholly disregarded in still another dictum:

> "The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained *by our decisions* [italics added]."

The "decisions" referred to were *Plessy*, *Gong Lum*, *Cumming*, and *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151 (1914), the latter involving a transportation statute like that in the *Plessy* case. Of these, only the *Gong Lum* case postdated *Buchanan* v. *Warley*—and the *Gong Lum* case did not claim to *decide* the present issue, but

purported instead to find its sole support in earlier decisions.

This Court's most recent opinions in this field, *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948), and *Fisher* v. *Hurst*, 333 U. S. 147 (1948), dealt with a situation in which no law school facilities were available to the petitioner, so that equal protection of the laws was clearly absent. Neither case was considered by this Court to have raised the issue of the validity of the segregation statute. *Fisher* v. *Hurst*, 333 U. S. 147, 150 (1948).

Apparently, then, the pseudo-dignity of the "separate but equal" doctrine in the area of education has been acquired solely through the lack of exploration of its true status over a long period of time.[4] Racial segregation in educational institutions truly presents a question of first impression in this Court, and it should be so treated.

Unconstitutionality of Racial Segregation in Education.

No reconsideration of the background of the Fourteenth Amendment in its relation to the present issue will be attempted in this brief.[5] Reference need only be made to Chief Justice Vinson's statement in *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948):

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoy-

4. See *ibid.*, at 408, in which a writer scarcely hostile to segregation in education characterizes the above sequence of cases as involving "circuitous reasoning" which has resulted in "a peculiar sort of judicial doubleplay."

5. Detailed exposition of this subject has already been submitted to the Court in the *amicus curiae* brief of The Committee of Law Teachers against Segregation in Legal Education in support of the petition for certiorari.

ment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."[6]

Recent years have seen constant emphasis by this Court on "the proposition that only the most exceptional circumstances can excuse discrimination on that basis [of race] in the face of the equal protection clause . . . ."[7] Even such "exceptional circumstances" are strictly limited: "Pressing public necessity may sometimes justify the existence of such restrictions; *racial antagonism never can.*"[8]

This interpretation of the equal protection clause necessarily condemns state systems of segregated education. For that clause forbids "[d]istinctions between citizens solely because of their ancestry."[9] States which follow the "separate but equal" line fail to realize that the constitutional requirement is not merely one of equal *facilities*, but one of equal *choice* of facilities. If the denial of that choice is based on race, it is unlawful.

The reason is simple. The basic premise "justifying"

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6. See *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 94 (1945): ["The Fourteenth Amendment] was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color."

7. *Oyama* v. *California*, 332 U. S. 633, 646 (1948); see also *ibid.*, at page 640, referring to "the compelling justification which would be needed to sustain discrimination of that nature."

8. *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944) (italics added), also stating "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."

9. *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943): "For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

segregation in the *Plessy* case (which has been followed without critical appraisal ever since) is clearly false. Ignore the unquestionable fact that "separate equality" in theory has always produced "separate *inequality*" in practice;[10] even assume that the segregation involves identity of facilities;[11] yet it must be concluded that mere *separation* on the basis of race is unconstitutional discrimination. Justice Brown, speaking for the Court in the *Plessy* case, asserted:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[12]

But the half century since that case has demonstrated otherwise:

> "A dual school system, even if 'equal facilities' were ever in fact provided, does imply social inferiority. There is no question under such circumstances as to which school has the greater social prestige. Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience. • • • These abnormal results, condoned by the implications of the *Plessy* case, deny to the Negro and Mexican child 'equal protection of the laws' in every meaningful sense of the words."[13]

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10. See particularly the Appendix to Petitioner's Brief in Support of Petition for Writ of Certiorari in the present case.

11. Perhaps the ideal example is that of two railway cars, as in the Plessy type statute.

12. 163 U. S. 551 (1896).

13. Segregation in Public Schools — A Violation of "Equal Protection of the Laws," 56 Yale L. J. 1059, 1060-61, 1062 (1947). The Note is heavily documented to support the conclusions reached in the passage here quoted.

Many facets of Justice Harlan's dissent in the *Plessy* case have gradually become the law of the majority of this Court. Only last year, Chief Justice Vinson's opinion in *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948), stated a thesis similar to that unsuccessfully propounded by Justice Harlan:

> "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

The applicability of that statement to the present situation need not be labored. Not until equal *choice* of schools is made available to white and Negro alike will the Fourteenth Amendment be satisfied; not until then will the Negro cease to be branded a "second-class" student by compulsory segregation. In short, this Court should give its stamp of approval to Justice Harlan's assertion that "Our Constitution is color-blind."[14]

Impact of This Case: The Overruling of Plessy v. Ferguson.

Every argument here advanced against the validity of the Texas constitutional requirement of segregated education is equally applicable to all other segregation based on race differences. The *Plessy* case adopted a standard of so-called "reasonableness" which permitted reference to "the established usages, customs and traditions of the people" and to "the preservation of the public peace and good order." But the former criterion is a denial that the Civil War was ever fought. *Slavery* was an "established usage, custom and tradition," and it was abolished by the Thirteenth Amendment. When the very issue to be considered is whether the Fourteenth Amendment abolished the "established usage, custom and tradition" of *segregation*, it begs the question to rely on the *past history*

14. Justice Harlan dissenting in *Plessy* v. *Ferguson*, 163 U. S. 551, 559 (1896); see Watt and Orlikoff, The Coming Vindication of Mr. Justice Harlan, 44 Ill. L. Rev. 13, 32-33 (1949).

of the practice to sustain its validity. As to the criterion of "public peace and good order," it has long since been rejected by this Court as a sufficient basis for distinctions grounded on race.[15]

Thus the *Plessy* decision is reduced to the assertion already quoted that acts requiring segregation in public conveyances (or, seemingly, anywhere else) are no "more obnoxious to the Fourteenth Amendment than acts * * * requiring separate schools for colored children * * *." But segregation in general is likewise no *less* obnoxious to the equal protection clause than segregation in education. In fact, Chief Justice Taft's opinion in *Gong Lum* v. *Rice*, 275 U. S. 78, 86 (1927), characterized the problem in the *Plessy* case as a "*more difficult question*" than that of the validity of segregated education. The same practice which, in education, seeks to label the Negro a "second-class" student, implies second-class citizenship the moment it is applied in other areas. The conclusion is obvious—a decision which invalidates the Texas constitutional provision in the present case undermines the sole foundation of the *Plessy* case. And that being true, *Plessy* v. *Ferguson* should be overruled by this Court.

Conclusion.

This Court's initial sanction of the "separate but equal" doctrine in the *Plessy* case recited:

> "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. * * * If one race be inferior to the other socially,

15. *Buchanan* v. *Warley*, 245 U. S. 60, 74 (1917). In *Shelley* v. *Kraemer*, 334 U. S. 1, 21 (1948), this Court relied on *Buchanan* v. *Warley* to refute the contention that the state police power extended to racial discrimination.

the Constitution of the United States cannot put them on the same plane."

But this premise, even if its validity is assumed solely for the purpose of argument, involves a total misstatement of the problem. The question is rather whether the states are empowered to lend *affirmative* aid to discrimination based on so-called "racial instincts"—whether the states can *create* distinctions having no reasonable relation to physical differences. It is respectfully submitted that the Fourteenth Amendment compels a negative answer.

Segregation statutes in education and in other fields have been labeled "effective means of tightening and freezing—in many cases of instigating—segregation and discrimination. * * *"[16] This court should not, by remaining silent on the question of lack of constitutionality of such statutes, allow itself to be an instrument for aiding that process of tightening and freezing. The alternative to a declaration of unconstitutionality—the tacit acceptance by courts of the "separate but equal" doctrine in litigation involving such statutes—has accomplished only one "educational" function: It has, by a process of successive adjudication, taught the states what border-line of token equality must be crossed to "satisfy" the equal protection clause. This Court should grant certiorari to settle clearly the question whether even equal education, if separate, fulfills the requirements of the Fourteenth Amendment.

Respectfully submitted,

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General Counsel.

THOMAS E. HARRIS,
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16 Myrdal, An American Dilemma 579-80 (1944).

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Supreme Court of the United States

OCTOBER TERM, 1948

HEMAN MARION SWEATT,

Petitioner,

v.

THEOPHILIS SCHICKEL PAINTER, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MEMORANDUM OF AMERICAN JEWISH CONGRESS, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION

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PHILIP BAUM,
of Counsel.

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Clark v. Directors, 24 Iowa 67 (1868) 20

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Ferguson v. Gies, 83 Mich. 358 (1890) 20

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Joyner v. Moore-Wiggins Co. Ltd., 152 App. Div. 266 (N. Y., 1912) 20

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Myers v. Anderson, 238 U. S. 368 (1915) 14

Nagl v. Delaware, 103 U. S. 370 (1881) 14

O'Connor v. Dallas Cotton Exchange, 153 S. W. 2d 266 (Tex., 1941) 18

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Oyama v. California, 332 U. S. 633 (1948) 12, 13

Penn. Coal Co. v. Mahon, 260 U. S. 393 (1922) 15

People v. Board of Education of Detroit, 18 Mich. 400 (1869) 20

Perez v. Lippold, 32 Adv. Cal. 757, 198 Pac. 2d 17 (1928) 21

Pickett v. Kuchan, 323 Ill. 138 (1926) 20

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Randall v. Cowlitz Amusements, 194 Wash. 92 (1938) 20

Shelley v. Kraemer, 334 U. S. 1 (1948) 10

Smith v. Allwright, 321 U. S. 649, 665 10

Strauder v. West Virginia, 100 U. S. 303 (1879) 17

Stultz v. Cousins, 242 F. 794 (C. C. A. 6th, 1917) 18

Tape v. Hurley, 66 Col. 473 (1885) 20

U. S. v. Carolene Products, 304 U. S. 144 (1938) 17

Wolfe v. Georgia Railway Electric Co., 2 Ga. App. 499 (1907) 18

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Miscellaneous

Bond, Education of the Negro in the American Social Order (1934) 9

Davis and Dollards, Children of Bondage (1940) 9

De A. Reid, Southern Ways, Survey Graphic (Jan. 1947) 7

Deutscher and Chein, The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion, 26 The Journal of Psychology, 259 (1948) 9

Gallagher, American Caste and the Negro College (1938) 9

Hawley, Dispersion vs. Segregation (unpublished paper), University of Michigan (1944) 9

Johnson, Patterns of Racial Segregation (1943) 158-161 4

Johnson, The Autobiography of an Ex-Colored Man (1927) 7

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Knight, Value and Price, Vol. XV, Encyclopedia of Social Sciences 13

Mangum, The Legal Status of the Negro (1940) 371-372 4

Marshall, Principles of Economics, Book II, Chapter 15 (1920) 13

McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional, 33 Calif. Law. Rev. 5 (1945) 20

McWilliams, Race Discrimination and the Law, Science and Society, Vol. IX, No. 1 (1945) 8, 19, 21

Myrdal, An American Dilemma (1944) 7

Nelson, The Fourteenth Amendment and the Negro Since 1920 (1946) 5, 10

Report of the President's Committee on Civil Rights, To Secure These Rights (1947) 8, 16, 20

Segregation in Public Schools—A Violation of "Equal Protection", 50 Yale Law Journal 1059 (1947) 9

Stephenson, Race Distinctions in American Law (1910) 36-38, 282 4

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Tuck, Not with the Fist (1946) 7

Waite, The Negro in the Supreme Court, 30 Minnesota Law Review (1946) 10

Ware, The Role of the Schools in Education for Racial Understanding, Journal of Negro Education, Vol. XII, No. 3 (1944) 8

Woofter, Basis of Racial Adjustment (1925) 9

Supreme Court of the United States

OCTOBER TERM, 1948

No. 667

HEMAN MARION SWEATT,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MEMORANDUM OF AMERICAN JEWISH CONGRESS, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION

The American Jewish Congress respectfully submits this brief, *amicus curiae*, in support of the petition for certiorari in this case.

The American Jewish Congress was organized in part "to help secure and maintain equality of opportunity for Jews everywhere, and to safeguard the civil, political, economic and religious rights of Jews everywhere". It established its Commission on Law and Social Action in 1945, in part

> To fight every manifestation of racism and to promote the civil and political equality of all minorities in America,

From time to time issues come before this Court involving the basic relationships between the many racial, re-

gious and national groups which make up our multicultural nation. Even where the immediate case does not directly involve Jews, the decision of this Court establishes rules and patterns which have application to all minority groups. Such groups have no defense but justice. If any such group is denied justice, human rights everywhere are insecure.

Such an issue is presented here. The petition for certiorari in this case challenges the constitutionality of state-imposed segregation in the law school of the State of Texas on the ground that it illegally discriminates among persons within the State of Texas on the basis of race.

In support of our belief that segregation of students in publicly supported schools should no longer be given judicial approval, we submit to this Court our view of the basic evils which flow from this statute and the manner in which it perpetuates undemocratic legal, economic and social patterns and our reasons for believing that a writ of certiorari should issue.

Jurisdiction

The judgment of the Texas Court of Civil Appeals was entered on February 25, 1948 (R. 465) affirming a judgment of the District Court of Travis County denying petitioner's request for a writ of mandamus (R. 438, 444). Motion for rehearing was denied on March 17, 1948 (R. 465). On September 29, 1948 application for writ of error to the Supreme Court of Texas was denied without opinion and on October 27, 1948 motion for rehearing was overruled (R. 471).

The petition for writ of certiorari was filed on March 23, 1949 after the issuance of an order by this Court on January 12, 1949 (R. 472) extending the time for such filing up to and including that date. This Court has extended the time to file the brief in opposition to the petition for writ of certiorari up to and including May 21, 1949.

Statement of the Case

This is a proceeding on the application of petitioner, Heman Marion Sweatt, a Negro, for a writ of mandamus to compel the appropriate officials of the University of Texas to grant him admission to its law school. The State of Texas bars all Negroes from attendance at the University of Texas (R. 40-41, 56, 161). School officials concede that petitioner is qualified for admission in all respects save for the disqualification of race. Respondents allege that adequate and equal facilities have been provided in a separate law school for Negroes established pursuant to an order of the District Court of Travis County at an earlier stage of this litigation (R. 424-433). Petitioner claims that his exclusion from the University of Texas and his assignment by the State to a separate "colored" law school contravenes his right to equal protection of the laws under the Fourteenth Amendment.

The Question Presented

The sole question to which this memorandum is addressed is the validity of the doctrine, established by this Court in 1896 in *Plessy* v. *Ferguson*, 163 U. S. 537, that the equal protection of the laws guaranteed by the Fourteenth Amendment may be afforded by the provision of "separate but equal" public facilities for Negro and white residents.

Summary of Argument

In Point I below we state our reasons for urging this Court to issue a writ of certiorari in this case. We show that the issue here is not merely the admission of one man into one school but the admission of an entire people into a community. We show further that the "separate but equal" doctrine, established in 1896, has never been re-

evaluated by this Court and that the pressing nature of the problems created by segregation make such a re-evaluation necessary.

In Point II we argue, in condensed form, that the doctrine of *Plessy* v. *Ferguson* is erroneous. The purpose of this section of the brief is to outline the arguments which we shall present if the petition for a writ of certiorari is granted and we are permitted to file a brief *amicus curiae* on the merits.

ARGUMENT

POINT I

The question whether the equal protection clause of the Fourteenth Amendment can ever be satisfied by the attempted provision of "separate but equal" public facilities for Negro and white residents is one of substantial public importance which should be reconsidered by this Court. The petition for writ of certiorari should therefore be granted.

A. Prior to the liberation of the slaves, the status even of the free Negro in the South as well as other parts of the country was avowedly inferior. In law as well as in practice his rights and privileges were restricted expressly on the basis of race (Stephenson, *Race Distinctions in American Law* [1910] 36-38, 282; Mangum, *The Legal Status of the Negro* [1940] 371-372).

After the abolition of chattel slavery, the Southern states continued to impose inferiority on the Negroes by law. Black codes were widely adopted which restricted the rights of the freedmen, again expressly on the basis of race (Stephenson, *op. cit.*, 40-48; Johnson, *Patterns of Racial Segregation* [1943] 158-161).

The Fourteenth Amendment with its requirement of equal protection of the law was directed against this in-

equality. It was designed to eliminate all unequal treatment on the ground of race at least by official state bodies. *Railway Mail Association* v. *Corsi*, 326 U. S. 88, 94 (1945). The resistance to this radical change took many forms; but unquestionably the most enduring was the thoroughgoing official program of establishing rigid barriers between Negroes and whites. The barriers were erected by laws requiring separate facilities wherever possible.

These laws were immediately recognized as an effort to circumvent the letter and spirit of the Fourteenth Amendment. They were accordingly attacked in the courts and the issue ultimately reached this Court in the *Plessy* case. In 1896 this Court decided that the laws were valid.

We believe that that decision was erroneous, viewed even as of the time it was issued. Thus, in reaching the astonishing conclusion that "in the nature of things it [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color" (163 U. S. at 544), this Court relied on an 1849 decision by a Massachusetts court (163 U. S. at 544-545). The assumption apparently was that "the nature of things" had in no way been changed by the Civil War and the subsequent constitutional amendments. Furthermore, the Court assumed the constitutionality of an act of Congress requiring separation in the schools of the District of Columbia and applied the same test to the state segregation statute, ignoring the fact that the equal protection clause of the Fourteenth Amendment had no application to the federal territory (163 U. S. at 545). "Whether the conclusions of the majority in this case, which has meant so much to our Negro fellow-citizens were right or wrong, the cynical and superficial character of the opinion cannot escape notice." Nelson, *The Fourteenth Amendment and the Negro Since 1920* (1946), pp. 156-158.

The chief importance of the *Plessy* decision today, however, is its prediction of how the "separate but equal" doctrine would work out in practice. The Court held that

it was a fallacy to believe that enforced separation of the races would "stamp the colored race with a badge of inferiority" and that indeed if the consequences of the doctrine were otherwise, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it" (163 U. S. at 551).

At a time when "separate but equal" facilities were just beginning to proliferate, these statements could be made with some plausibility and perhaps even some hope of future validation. Today they do not bear a moment's inspection.

B. Bearing the approval of this Court, the "separate but equal" doctrine has supplied the rationale for a detailed and exhaustive oppression of the Negro population of the South. Where racial segregation is established "every aspect of life is regulated by the laws on race and color. From birth through education and marriage to death and burial there are rules and regulations saying that you are born 'white' or 'colored'; that you may be educated, if colored, in a school system separated on the basis of race and 'as nearly uniform as possible' with that available for whites; that you may marry a person of your choice only if that person is colored, this being the only celebration of marriage a colored minister of the gospel may perform; and that when you die (in Atlanta, at least) you may not be buried in a cemetery where whites are interred.

"But that isn't all. Between birth and death colored persons find that the law decrees that they shall be separated from white persons on all forms of transportation, in hotels or inns, eating places, at places of recreation or amusement, on the tax books, as voters, in their homes, and in many occupations.

"To be specific, it is a punishable offense in Georgia for a barber shop to serve both white and colored persons, or for Negro barbers to serve white women or girls;

to bury a colored person in a cemetery in which white people are buried; to serve both white and colored persons in the same restaurants within the same room, or anywhere under the same license. Restaurants are required to display signs reading *Licensed to serve white people only*, or *Licensed to serve colored people only*. The law also declares that wine and beer may not be served to white and colored persons 'within the same room at any time.' Taxis must be marked *For White Passengers Only*, or *For Colored Passengers Only*. There must be white drivers for carrying white passengers and colored drivers for carrying colored passengers." Ira de A. Reid, *Southern Ways*, Survey Graphic, Jan. 1947, p. 39.

As Myrdal has put it: "The Negro leader, the Negro social scientist, the Negro of art and letters is disposed to view all social, economic, political, indeed even esthetic and philosophical issues from the Negro angle. What is more, he is expected to do so. He would seem entirely out of place if he spoke simply as a member of a community, a citizen of America or as a man of the world. He is defined as a 'race man' regardless of the role he might wish to choose for himself. He cannot publicly argue about collective bargaining generally in America, the need of a national budgetary reform, monetary schemes for world organizations, moral philosophy and esthetic principles. * * * the Negro genius is imprisoned in the Negro problem." Myrdal, *An American Dilemma* (1944), p. 28. Racial segregation "is the dwarfing, warping, distorting influence which operates upon each and every coloured man in the United States. He is forced to take his outlook on all things, not from the viewpoint of a citizen, or a man, or even a human being, but from the viewpoint of a *coloured* man." Johnson, *The Autobiography of an Ex-Colored Man* (1927: first edition 1912), p. 21. Segregation inevitably means "one-sided development * * * ignorance of life outside of one's group." Tuck, *Not with the Fist* (1946), p. 107.

The oppressive character of enforced segregation is compounded by the fact that it creates and enforces divisiveness and promotes interracial hostility. As stated by the President's Committee on Civil Rights in its historic Report of October 29, 1947, "Segregation is an obstacle to establishing harmonious relationships among groups." ("To Secure These Rights," pp. 82-83.)

An acute sociologist has observed: "The general effect of segregation has been to create an ever-widening gulf between the segregated peoples. The absence of social contacts has increased mutual ignorance, suspicion and social distance and has decreased mutual understanding, appreciation and the development of common interests. It has had a narrow and stunting effect and has intensified the unique features of each group. It has frequently resulted in the subordinate group of a feeling of frustration and resignation and in the dominant group of a condescending and patronizing attitude." Professor Louis Wirth, quoted in McWilliams, *"Race Discrimination and the Law,"* Science and Society (Winter, 1945), pp. 20-21. In a segregated school system, "the sheer fact of segregation stands as an eternal reminder to every white child, every day, that the Negro or Mexican children are being kept away from his school. And the children of racial minorities are reminded, daily, that they are outcasts. In each is bred the habit of distance and of stereotyped thinking. Each learns either not to see the other as they pass on the way to school, or to see and to dismiss from attention." Ware, *The Role of the Schools in Education for Racial Understanding.* Journal of Negro Education, Vol. XIII, No. 3, p. 424.

It is plain that "the physical separation of the opposed groups is in itself a barrier to participation by one in the affairs of the other. It also has the effect of throwing into sharp focus the differences between groups; in fact, it accentuates those differences by heightening the visibility of the minority population. In exaggerating the illusion of homogeneity and, at the same time obscuring

the reality of individual variation, spatial segregation provides support for prevailing stereotypes. Prejudicial beliefs are further reinforced by the aspect of concreteness which is lent thereby to social distance." A. H. Hawley, Department of Sociology, University of Michigan, *Dispersion* v. *Segregation*, an unpublished paper (April 14, 1944), quoted in McWilliams, *op. cit. supra*.

As we have noted, the "separate but equal" doctrine was established at a time when its operation could only be surmised. Since that time, the continuously developing methods and techniques of the social sciences have provided us with fresh insights into the nature and effect of segregation. Less conjectural and more empirical, they have produced overwhelming evidence against the segregation principle: Deutscher and Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 The Journal of Psychology 259 (1948); Bond, *Education of the Negro in the American Social Order* (1934); Gallagher, *American Caste and the Negro College* (1938); Davis & Dollard, *Children of Bondage* (1940); Woofter, *Basis of Racial Adjustment* (1925).

This Court should not continue to extend judicial approval to a notion which has been thoroughly discredited in that laboratory which is the nation itself. Since "every authority on psychology and sociology is agreed" that students subject to discrimination and segregation are profoundly and adversely affected (*Segregation in Public Schools—A Violation of "Equal Protection,"* 50 Yale L. J. 1059, 1061 (1947)), any new evaluation by this Court of the effects of state-imposed segregation must differ greatly from that of the Court which decided the *Plessy* case.

It is not only the factual basis of the *Plessy* decision which has been destroyed. The legal conclusions on which it rested have also in large part been rejected in subsequent decisions of this Court.

Basic to the *Plessy* rationale is the already quoted statement that "in the nature of things it [the Fourteenth Amendment] could not have been intended to abolish dis-

tinctions based upon color." (163 U. S. at 544). This cannot be reconciled with the many recent decisions of this Court holding, as in *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1947): "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

Furthermore, this Court has refused to apply the "separate but equal" doctrine to housing. *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). This result is not based on the theory that land and houses are *sui generis* but on the broad ground that "equal protection of the laws is not achieved through indiscriminate imposition of inequalities" (334 U. S. at 22).

The plain conflict between this statement and the *Plessy* rule is explored in 21 So. California Law Review 358 (1948). We submit that this conflict should be resolved.

Not since the *Plessy* case was decided in 1896 has this Court squarely stated its position with reference to state-imposed segregation. Waite, 30 *Minn. Law Review* 29 (1946); Nelson, *The Fourteenth Amendment and the Negro Since 1920* (1946). It should do so now. "In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day." *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944).

Born of a union of bad prophecy with bad history, the *Plessy* doctrine has succeeded in concealing racial hatreds under a mask of legal respectability. We have no doubt that upon re-examination by this Court, the *Plessy* doctrine will be overruled and its capacity for evil will come to an end.

POINT II *

The equal protection clause of the Fourteenth Amendment can never be satisfied by the attempted provision of "separate but equal" facilities for Negro and white residents.

A—State classification and segregation of a racial or religious group as inferior is a denial of equal protection of the laws in violation of the Fourteenth Amendment.

1. THE CONSTITUTIONAL COMMAND OF EQUAL PROTECTION REQUIRES MORE THAN MERE PHYSICAL EQUALITY.

a. The law recognizes such intangibles as location.

It is not disputed that the furnishing by an official body of inferior physical facilities to any given ethnic group is unconstitutional and discriminatory conduct. *Plessy* v. *Ferguson*, 163 U. S. 537 (1896).

Mere identity of physical facilities, however, does not necessarily amount to equality either in the economic, political or legal sense. The law would not recognize, for example, that an estate has been divided *equally* between two children each receiving one of the two identical houses comprising the estate, if one of the houses were located in a busy banking district and the other fifty miles from the nearest railroad station. Nor would a probate court accept the division as *equal* even if the two identical houses were located on the same street, opposite each other, but if, for some known or unknown, valid or invalid reason, one side of that street were fashionable and sought-after, the other neglected and rejected. Equality is indeed determined, in fact and in law, not by the physical identity of things assigned in ownership use or enjoyment, but by identity or substantial similarity of their *values*.

The equal protection clause demands, in the enjoyment of government furnished facilities, an equality not less

* The argument in this Section was first developed by the late Dr. Alexander H. Pekalis, Professor, Graduate Faculty, New School for Social Research.

real and substantial than the one it exacts for protection of heirs or partners. It calls for genuine equality and not merely formal or physical identity of treatment. Cf. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 357, 676 (1938).

b. In determining equality of value, social values must also be considered.

In their turn, values do not depend solely or even primarily on the physical properties of things or facilities to be valued but also on the "social location" of these things or facilities, on their social significance and psychological context or, in short, on the community judgment attached to them. "In approaching cases, such as this one, in which certain constitutional rights are asserted, it is incumbent upon us to inquire not merely whether its rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled." *Oyama* v. *California*, 332 U. S. 633 (1948).

It is a well-known fact that the value and desirability of many objects, facilities, traits or characteristics may depend not so much upon their intrinsic qualities or defects, advantages or shortcomings as upon their association with or use by persons enjoying a certain reputation. The value of a mediocre type of fabric may be enhanced by an *arbiter elegantiarum* wearing it; the desirability of a beautiful resort may be lessened by its being visited by people deemed of "low" social standing. If a group considered "inferior" by the prevailing community sentiment adopts any given color of garment, accent of speech, or place of amusement, that color, accent or place will automatically be shunned by the majority and become less desirable or valuable.

The theory, sometimes advanced in the area of racial segregation, that physical equivalence is complete equivalence, is not duplicated in any other aspect of social affairs. It is a confusion that stems from the belief that costliness

is synonymous with value, expensiveness a guarantee of worth. We never make this mistake in our dealings in the market place. No matter how expensive or complicated an object in its manufacture, it is made totally worthless if it is rejected or reviled by community opinion. See Frank H. Knight, *Value and Price*, p. 218, Vol. 15, Encylopedia of Social Sciences. See also, Alfred Marshal, *Principles of Economics*, Book II, Chapter 15 (8th Ed., 1920). In short, if equality is to be meaningful it must include equality in "social location."

It is manifest then that even assuming that a Negro school were built which duplicated exactly the physical plant of a white school, inferiority would still stem from the fact that the Negro school would be reserved for those who are not eligible for attendance at regular institutions. Thus, no matter how attractive the facilities of a Negro school were made or how wide its doors were flung, non-Negro students would assuredly abstain from seeking admission into its halls. Nor would the Negro students in attendance regard themselves as in a position of equivalence.

2. A STATE MAY NOT USE THE DEVICE OF SUPPLYING SEGREGATED FACILITIES IN ORDER TO PLACE A RACIAL OR RELIGIOUS GROUP IN AN INFERIOR STATUS.

It could hardly be disputed that a statute providing for the confinement of racial or religious groups to separate parks, schools and recreational facilities upon the declared theory that the group is inferior would be discriminatory and therefore unconstitutional. *Hirayabashi* v. *U. S.*, *supra*; *Korematsu* v. *U. S.*, 323 U. S. 214 (1944); *Oyama* v. *California*, *supra*. This result is required by the fact that an official declaration of inferiority would of itself establish an inferiority of value. And it would be subject to the restraint of the Constitution because the declaration, itself possibly immune to constitutional attack, would be accompanied by action having a discriminatory effect.

The official assignment to separate parks, schools or halls based on an officially stated conviction of inferiority would be an assignment of facilities *inferior per se*, regardless of their physical identity with the facilities assigned to the "better" group.

The situation as here described could not be characterized as merely *social* inequality. We may assume that social inequality has antedated the enactment of the assumed statute or regulation. But a legislative or administrative declaration of that pre-existing social inferiority and the ensuing action of assignment of facilities, inferior because segregated, amount to the creation of a *legally sanctioned* inequality.

The discriminatory effect of such legally sanctioned inequality can be demonstrated by reference to recent tragic history. The Nazis understood it fully when they imposed on Jews the wearing of the Yellow Star of David. *Polizeiverordnung ueber die Kennzeichnung der Juden vom L. September 1941*, RGBl, I. S. 547, ausgeg. am 5. IX. 1941.

3. THE PLACING OF A RACIAL OR RELIGIOUS GROUP IN AN INFERIOR STATUS BY SEGREGATION CAN BE ACCOMPLISHED BY THE STATE WITHOUT AN EXPRESS DECLARATION OF SUCH STATUS.

We do not have here, of course, an express statement by the State of Texas that the purpose of its segregation statute is to maintain inequality. Nevertheless, the same result must be reached if that is in fact its purpose. Official action will not be allowed to accomplish by indirection what it may not achieve openly. *Poindexter* v. *Greenhow*, 114 U. S. 270, 295 (1884); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373 (1886); *Guinn* v. *United States*, 238 U. S. 347, 364 (1915); *Myers* v. *Anderson*, 238 U. S. 368 (1915); *Neal* v. *Delaware*, 103 U. S. 370 (1881).

The failure of a statute or regulation expressly to declare a legal inferiority does not protect it from the scrutiny of the courts. When the reasonableness of a legis-

lative classification is in question, the courts will look behind the apparent classification to determine the real intent of the law and whether or not, in fact, an illegal classification has been made. *Henderson* v. *Mayor*, 92 U. S. 259, 268 (1875); *Bailey* v. *Alabama*, 219 U. S. 219, 244 (1911); *Penn Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1922). Thus, in *Yick Wo* v. *Hopkins, supra*, this Court declared (118 U. S. at p. 373): "Though the law be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The implicit rather than the explicit declaration of inferiority may be made in at least two ways: First, the state may have established the inferiority in other official acts. Thus, if statutes, judicial decisions or other official pronouncements declare that a particular race is inferior, the assignment of separate facilities becomes an assignment of inferior facilities. We shall show below that such independent declarations of inferiority have in fact been made.

Second, the state may by its segregation policy impliedly adopt an already established social inferiority. Official adoption of social classifications of necessity implies the adoption of the meaning inherent in, and inseparable from, the classifications themselves, that of the respective inferiority and superiority of the groups. It may be doubted whether or not law should take affirmative steps to eliminate social inequality. But it seems certain that law may not adopt, sanction and enforce it. Whenever law adopts a social classification based on a notion of inferiority, it transforms the pre-existing *social* inequality into *legal* inequality. What ensues is official discrimination, a denial of equality before the law, whether or not the statement of inferiority is made openly by the government or inheres in the classification upon which official action is based.

The reason that constitutional inhibitions attach when the state gives legal effect to pre-existing social inequalities is that the state's action causes a change in both the degree and nature of the inequality. Once a social classification based on group inferiority is "adopted" by the law, the ensuing legal inferiority will in its turn intensify and deepen the social inequality from which it stems. The actual operation of segregation statutes illustrates this oppressive function of the law. It is well known, for instance, that the doctrine of "separate but equal" facilities has proved to be a mere legal fiction in most cases, that invariably segregation has been accompanied by gross discrimination, and that absolute equality seldom, if ever, exists. For example, the President's Committee on Civil Rights found that the "separate but equal" doctrine "is one of the outstanding myths of American history for it is almost always true that while indeed separate these facilities are far from equal." ("To Secure These Rights," pp. 81-82.)

This situation involves at the same time another kind of vicious circle. The effect of segregation laws makes their spontaneous repeal or amendment a practical impossibility. When a more or less inarticulate social feeling of racial superiority is clothed with the dignity of an official law, that feeling acquires a concreteness and assertiveness which it did not possess before. The stricter the law, the stronger and the more articulate the feeling of social distance. And the stronger that feeling, the stricter the law and the more difficult its amendment or repeal. In such setting the democratic processes themselves are threatened and no reliance can be placed on their correcting effect. It is this type of situation which Chief Justice Stone had in mind when, in sustaining an economic measure as presumptively valid, he warned that the decision did not foreclose the question whether "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial

scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation" and whether "similar considerations enter into review of statutes directed at particular religious * * * or national * * * or racial minorities * * *." Accordingly, he noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States* v. *Carolene Products*, 304 U. S. 144, 154, footnote 4 (1938).

We shall show in the following sections that the system of segregation is in fact designed to maintain inequality; and that it has no other basis.

B—The system of State-controlled segregation of Negroes is designed to maintain them in an officially declared status of inferiority and in a previously established status of social inequality.

1. Official Declaratons of Inferiority.

State imposed segregation stems directly from a vestigial theory of the superiority and inferiority of races inherited as a remnant of the institution of slavery. With the freeing of slaves, attempts were made by the dominant white group to preserve its position of ascendancy by the enactment of discriminatory legislation. "It required little knowledge of human nature to anticipate that those who had long been regarded as *an inferior and subject race* would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed." *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1879) (italics supplied). Thus, in the post-slavery period, Negroes were punished with greater severity than whites for identical offenses. See *General Laws under the Seventh Legislature of the State*

of Texas, Chapter 121. And Negroes were made incompetent as witnesses in proceedings against white persons. *Laws passed by First Legislature of the State of Texas, An Act to regulate proceedings in a District Court, Section 65.* In the State of Texas the abiding conviction of the inferiority of the Negro race is manifest even in its assessment statutes. "Assessors shall receive 3¢ for each white inhabitant residing in the county * * *. 2¢ for each white inhabitant in a town or city and 1¢ for each slave or free person of color." *Laws passed by the First Legislature of the State of Texas, An Act to Provide for the Enumeration of the Inhabitants.*

These official declarations of inferiority have by no means been abandoned by Texas or the other Southern states. They are maintained and reiterated in the many decisions holding that the word "Negro" or "colored person" when applied to a white person gives rise to a cause of action for defamation. *Flood* v. *News & Courier Co.*, 71 S. C. 112 (1905); *State* v. *Cousins*, 242 F. 794 (1917). The attitudes of these Courts is clear. "It is a matter of common knowledge that, viewed from a social standpoint, the Negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic times denies equality." *Wolfe* v. *Georgia Railway Electric Co.*, 2 Ga. App. 499. See also *O'Connor* v. *Dallas Cotton Exchange*, 153 S. W. 2d 266 (Tex., 1941). Similarly, the highest Court of Oklahoma has declared: "In this state, where a reasonable regulation of the conduct of the races has led to the establishment of separate schools and separate coaches, and where conditions properly have erected unsurmountable barriers between the races when viewed from a personal and social standpoint, and where the habits, the disposition, and characteristics of the race denominate the colored race as inferior to the Caucasian, it is libelous *per se* to write of or concerning a white person that he is colored. Nothing could expose him to more obloquy, or contempt, or bring him into more disrepute, than a charge

of this character." *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229 (1919).

In the face of these official pronouncements, the policy of segregation cannot be treated as equal and impartial.

2. The Previously Established Social Inequality.

"Supremacy" is not "equality." That proposition needs no elaboration. Yet it is easy to show that the doctrine of segregation is irrevocably linked with the equally widely held, though admittedly unconstitutional, doctrine of "white supremacy." At the very least, it has led to that doctrine, as Justice Harlan predicted in his dissenting opinion in *Plessy* v. *Ferguson*, 163 U. S. at pp. 559-564.

It is consequently not strange to find that students of segregation statutes uniformly find that they rest on notions of superiority: "Systematic discrimination against a racial minority usually assumes the form of segregation. The subordinate status of the group may, in fact, be inferred from the modes of segregation to which it is subjected." McWilliams, *Race Discrimination and the Law*, Science and Society, Vol. IX, No. 1 (1945). Indeed, the entire pattern of mores governing Negro-white relationships is inexplicable except in the terms that "In the magical sphere of the white man's mind, the Negro is inferior, totally independent of rational proofs or disproofs. And he is inferior in a deep and mystical sense. The 'reality' of his inferiority is the white man's own indubitable sensing of it, and that feeling applies to every single Negro * * * the Negro is believed to be stupid, immoral, diseased, lazy, incompetent, and *dangerous*—dangerous to the white man's virtue and social order." Under these conditions "it is fallacious to say * * * that the intention and effect [of segregation] is not to impose any badge of inferiority * * * When a Negro workingman or woman is seated in the third seat of a street car on St. Charles Avenue in New Orleans and when a white man and woman is seated on the fourth seat, separated only by a bit of wire mesh ten inches high on the back of the third seat this is a

'separation' that is merely a symbolic assertion of social superiority, a 'ceremonial' celebration." McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,* 33 Calif. L. Rev. 5 at p. 27 (1945).

It is equally important that those states which have rejected the theory of inferiority by passing laws prohibiting racial discrimination have uniformly interpreted those laws as prohibiting segregation. *Joyner* v. *Moore-Higgins Co.,* 152 App. Div. 266 (N. Y., 1912); *Ferguson* v. *Gies,* 82 Mich. 358 (1890); *Bolden* v. *Grand Rapids,* 239 Mich. 318 (1927); *People* v. *Board of Education of Detroit,* 18 Mich. 400 (1869); *Crosswaith* v. *Berger,* 95 Colo. 241 (1934); *Jones* v. *Kehrlein,* 194 P. 55 (Cal., 1920); *Prowd* v. *Gore,* 207 P. 490 (Cal., 1922); *Wysinger* v. *Crookshank,* 23 P. 54 (Cal., 1890); *Tape* v. *Hurley,* 66 Col. 473 (1885); *Anderson* v. *Pantages,* 114 Wash. 24 (1921); *Randall* v. *Coulitz Amusements,* 194 Wash. 82 (1938); *Baylies* v. *Curry,* 128 Ill. 287 (1889); *Pickett* v. *Kuchan,* 323 Ill. 138 (1926); *Clark* v. *Directors,* 24 Iowa 67 (1868).

C—The system of State-imposed segregation of Negroes serves no purpose other than to maintain Negroes in an inferior status.

Among the reasons sometimes given for maintaining segregation are that it is necessary to prevent racial conflict, that it is based on natural law and that it is essential to prevent "mongrelization" of the race.

The first of these propositions is rejected by all recent students of segregation. They find, on the contrary, that is promotes conflict. Thus, the President's Committee on Civil Rights found that "the 'separate but equal' doctrine has institutionalized segregation and kept groups apart despite indisputable evidence that normal contacts among these groups tend to promote social harmony." ("To Secure These Rights," p. 87.) "Segregation as a supposed instrument of social order has shown itself as a source of social chaos. During the race riots in Detroit

in 1943, rioting occurred in sections of the city inhabited exclusively either by white or colored citizens, but not in sections where the two races lived side by side. Disturbances occurred in plants where black and white workers were segregated; not where they worked side by side." McWilliams, *Race Discrimination and the Law*, Science and Society (Winter, 1945).

Space does not permit discussion here of the other defenses of segregation. We respectfully refer the Court to the illuminating opinion of the California Supreme Court in *Perez* v. *Lippold*, 32 Adv. Cal. 757, 198 Pac. 2d 17 (1948), which entirely demolishes the argument that segregation laws are necessary either to enforce natural law or to prevent the degradation of mankind.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

October Term, ~~1948~~ 49

No. ~~887~~ 44

HEMAN MARION SWEATT,

Petitioner,

v.

THEOPHILIS SHICKEL PAINTER *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Texas

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE B'NAI B'RITH (ANTI-DEFAMATION LEAGUE) and NATIONAL CITIZENS' COUNCIL ON CIVIL RIGHTS AS *AMICI CURIAE*

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David and Dollard, Children of Bondage (1940) 17

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House Resolution 334, 80th Cong., 2nd Sess. 28

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Selective Service in Peacetime, First Report of the Director of Selective Service, 1940-41 (Washington, 1942) 27

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IN THE

Supreme Court of the United States

October Term, 1948

No. 667

HEMAN MARION SWEATT,

Petitioner,

v.

THEOPHILIS SHICKEL PAINTER *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Texas

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE B'NAI B'RITH (ANTI-DEFAMATION LEAGUE) and NATIONAL CITIZENS' COUNCIL ON CIVIL RIGHTS AS *AMICI CURIAE*

Interest of the *Amici* *

This brief is filed, with the consent of both parties, on behalf of the American Jewish Committee, the Anti-Defamation League of B'nai B'rith, and the National Citizens' Council on Civil Rights.

* The Appendix contains a description of the organizations appearing as *amici curiae*.

Each of these organizations is dedicated to the preservation of democratic rights guaranteed all citizens by our Federal Constitution. Each has long since recognized that the invasion of the rights of any individual or group on the basis of race undermines the foundation of rights guaranteed to all groups in our democracy.

The present case causes us deep concern because the pattern of discrimination in segregated educational facilities has deprived millions of Americans of equality of opportunity and has perpetuated an abhorrent caste system. In the light of sociological and psychological insights gained from experience with segregated school systems it is clear that compulsory segregation results in physical, social, intellectual and economic inequality for the Negro and any other segregated group. These inequalities give rise to and strengthen the effect of inequalities in other areas of human activity, for such inequalities compound each other.

Beyond this, we are concerned with the fact that segregation has become an effective threat to the very foundation of our democratic way of life. If a State can require segregation in education for Negroes, it can also require it for Chinese, see *Gong Lum* v. *Rice*, 275 U. S. 78, for Mexicans, see *Westminster School District* v. *Mendez*, 161 F. (2d) 774, or for any arbitrarily selected group. Segregation maintains the racist doctrine that undesirable social traits and inferior mental capacities inhere not in the individual, but in the group. This concept must be excised from the fabric of our society. Certainly a first step is to remove it from our law.

It should be stated finally that we are fully aware that implicit in the defense by some of segregation and of the "separate but equal" doctrine is the fear that a destruction of the barriers of segregation will give rise to in-

creased racial tensions. We believe that the ugly prejudices which create such tensions batten on segregation.

A decision by this Court eliminating racial segregation in education will strengthen the democratic relationships among the various groups in our population. This issue must be faced honestly and boldly.

Opinions Below

The judgment of the Supreme Court of the State of Texas refusing the application for writ of error to the Court of Civil Appeals for the Third District, dated September 29, 1948, without opinion, appears on page 466 of the record. The order, dated October 27, 1948, overruling the motion for a rehearing, without opinion, appears on page 471 of the record. The opinion of the Court of Civil Appeals, dated February 25, 1948, appears at page 445 of the record, and that of the District Court of Travis County, dated June 17, 1947, is reported at page 438.

Jurisdiction

Jurisdiction is invoked under Title 28, United States Code, section 1257 (3).

Statement of Facts

The petitioner in this case, Heman Marion Sweatt, sought admission to the School of Law of the University of Texas. He concededly met all of the academic qualifications, but the authorities of the University denied him enrollment because he is a Negro.

In the State of Texas in accordance with statutory and constitutional provisions the maintenance of separate schools for whites and Negroes is compulsory. The University of Texas Law School which Sweatt sought to enter is maintained for white students only.

On May 16, 1946, Sweatt brought an action in mandamus in the District Court of Travis County, Texas, to compel the members of the Board of Regents of the University of Texas, and others, to admit him as a student. That court, after a hearing, entered an order finding that Sweatt was denied the equal protection of the laws since no provision had been made by the State of Texas for his legal training.

The District Court did not, however, grant the writ of mandamus but rather adjourned further consideration of the action until December 17, 1946, giving the respondents six months time within which to produce a course of legal instruction substantially equivalent to that provided for white students at the University of Texas.

At the second hearing on the application for the writ, which took place December 17, 1946, the State of Texas attempted to show the availability of a law school for Sweatt by presenting to the court a copy of a resolution adopted November 27, 1946, by the Board of Directors of Texas A. & M. College to the effect that if Negro applicants for law school training were to present proper evidence of the required academic qualifications they would be admitted to a law school for Negroes to be established in Houston, Texas for the semester beginning February 1947. There was no evidence produced, however, to show that a law school for Negroes had actually been established.

On the basis of this representation at the December 17th hearing the court entered a final order denying the petition.

This judgment was set aside without opinion by the Court of Civil Appeals, and the cause was remanded for further proceedings without prejudice to the right of any party.

Meanwhile, the State authorities established a separate Negro law school in premises rented in an office building in Austin, Texas, for a period to begin sometime in the latter part of February or early March 1947, and to end on August 31, 1947. A description of the facilities provided for this law school is given in Point II of the argument, *infra*.

In May 1947, by amendment and supplementation of the original pleadings, the petitioner and respondents joined issue on the question whether the establishment of this separate Negro law school during the period of proceedings on the appeal was sufficient compliance with the equal protection clause of the Fourteenth Amendment and, therefore, whether the refusal to admit Sweatt to the School of Law of the University of Texas was arbitrary and in violation of the Fourteenth Amendment.

The trial on this issue was held before the district court sitting without a jury. Judgment was rendered for respondents. This was affirmed on appeal to the Civil Court of Appeals. Writ of error was refused by the Supreme Court of the State of Texas.

Summary of Argument

The following arguments will be urged in this brief:

I. This Court has never before decided on the Constitutional validity of racial segregation in public education. The Court has, in *dictum*, signified its approval of the "separate but equal" doctrine as applied to education, but has never ruled specifically whether racial segregation in education is within the "equal protection of the laws" provision of the Fourteenth Amendment.

II. Racial segregation in public education results in inequality and is a form of discrimination.

This Court has recently stricken down many forms of discrimination in such fields as housing, ownership of land, eligibility for employment and in jury duty. The Court has particularly opposed discriminatory practices "rooted deeply in racial, economic and social antagonisms."

The "separate but equal" doctrine urged here stresses that separation is not discrimination where physically equal facilities are provided, but the "separate but equal" doctrine is a fiction which must be pierced. Segregation results in social, intellectual, physical and economic inequality and hence is discriminatory.

Social inequality is an inevitable concomitant of segregation. The premise of *Plessy* v. *Ferguson* that segregation does "not necessarily imply the inferiority of either race to the other" is invalid.

Intellectual inequality results where students in one racial group are separated from others so that they cannot share in intellectual discussion in law classes, in law review work, in moot courts and the like.

The physical equality supposedly guaranteed by the "separate but equal" doctrine does not exist in fact. The physical facilities afforded white students in Texas are far superior to those provided for Negroes and the University of Texas Law School for white students is incomparably superior to the law school provided for Negroes. Nor can physical equality in dual school systems be achieved in the future.

Economic inequality also inheres in racial segregation in education. The legal profession is peculiarly one in which social relationships lead to economic opportunities which shape a lawyer's career. Negroes denied the fullest possible social relationships are deprived of economic rights.

In the light of this, the Court is asked to grant the petition for certiorari and decide whether racial segregation in public education is a violation of the "equal protection of the laws" under the Fourteenth Amendment.

III. It is of great importance to this nation that the Court decide this issue now.

Racial segregation in our country is a threat to our leadership in international affairs. We have subscribed to international agreements and resolutions which are contradicted by our practices. A continuation of segregation gives the lie to our democratic protestations at a time when our leadership in world affairs is challenged.

Finally, unless racial segregation in education is declared unconstitutional now, we may expect a further crystallization of patterns of discrimination, inasmuch as governors of eleven Southern States are planning to implement a regional compact which will provide higher education for Negroes on a segregated basis.

POINT I

The validity under the equal protection clause of the Fourteenth Amendment of racial segregation in public educational facilities has never before been decided by this Court.

The issue before this Court is whether it will grant certiorari in order to determine the validity of constitutional and statutory provisions of the State of Texas which require racial segregation in public educational facilities. Despite the transcendent importance of the question, this Court has never ruled directly on the constitutionality of segregation in public education. The Court has decided on similar problems, such as the validity of racial segregation in transportation and in housing. It has also approved, but always in *dictum*, of racial segregation in education, and has decided matters relating to educational segregation where the validity of segregation was merely assumed and not in question. But this Court has never before ruled flatly and specifically on the validity under the Fourteenth Amendment of segregation in education.

Following the adoption in 1868 of the Fourteenth Amendment, the earliest case in which some reference was made by this Court to racial segregation in education was *Hall* v. *DeCuir*, 95 U. S. 485 (1877), which involved the validity of a State statute prohibiting segregation by race in public carriers. The statute was declared unconstitutional as an improper regulation of foreign and interstate commerce. In a concurring opinion, Mr. Justice Clifford reviewed with approval the conclusions of a number of State cases which had upheld the reasonableness of racial segregation in education and stated in

dictum that segregation in the public schools did not violate the Fourteenth Amendment if physically equal school facilities for Negroes were preserved.

In 1896 this Court decided *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), which sustained the constitutionality of a Louisiana statute which required public carriers to furnish separate but equal coach accommodations for whites and Negroes. The Court as before, in *dictum*, cited with approval several ancient State cases which had held that a State could require the segregation of racial groups in its educational system provided that facilities for all groups were physically equal.

The constitutionality of "separate but equal" facilities in *education* was concededly not before the Court in either the *Hall* or the *Plessy* cases. Yet, although there was no basis for a discussion of equal facilities in education, and in spite of the fact that the statements of the Court were *dicta*, the *Plessy* case was subsequently employed by State and lower federal courts[1] to proclaim the legality of segregation in educational institutions.

Three years later, this Court decided *Cumming* v. *County Board of Education*, 175 U. S. 528 (1899). There an injunction was sought to restrain the board of education from maintaining a high school for white children where none was maintained for Negro children. The State court had upheld the board of education, saying that its allocation of funds did not involve bad faith or abuse of discretion. In upholding the decision of the State court, Mr. Justice Harlan stated expressly that racial segregation in the school system of the State was not in issue.

The next case before this Court which involved compulsory educational segregation was *Berea College* v. *Kentucky*, 211 U. S. 45 (1908), wherein the validity of a State

[1] See cases cited, 46 Mich. L. Rev. 639, 643 (1948).

statute which prohibited domestic corporations from teaching white and Negro pupils in the same private educational institution was attacked. While the scope of the statute was broad enough to include individuals as well as corporations, this Court said (at 54),

> • • • it is unnecessary for us to consider anything more than the question of its validity as applied to corporations. • • • Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations.

This Court upheld the reasoning of the State court that the statute could be upheld as coming within the power of a State over one of its own corporate creatures. The statute was considered not to have embodied a deprivation of property rights. The rights of individuals were not considered.

Not until 1927 did racial segregation in educational institutions again become the subject of controversy before this Court. In *Gong Lum* v. *Rice*, 275 U. S. 78 (1927) a Chinese contested the right of the State of Mississippi to exclude her from the high school for whites, and to assign her to the colored school under the State's segregated school system. The State contended that under its constitutional provision requiring that separate schools be maintained for children of the white and colored races, the plaintiff could not insist on being classed with the whites and that the legislature was not compelled to provide separate schools for each of the colored races.

The issue of segregation was not presented in this case. The plaintiff accepted the system of segregation in the public schools of the State but contested her classification within that system.

Nor was the validity of segregation before the Court in the case of *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938). There the petitioner was refused admission to the University of Missouri Law School, a State supported institution, solely because he was a Negro. He brought mandamus to compel the University to admit him. The State, having no law school for Negroes, sought to fulfill its obligation to provide equal educational facilities by paying the petitioner's tuition for a legal education in another State. This the Court held did not satisfy the Constitutional requirement. It said that the petitioner was entitled to be admitted to the University of Missouri Law School in the absence of other and proper provision for his legal training within the State of Missouri.

Again, the issue was not segregation but whether an otherwise qualified Negro applicant for law training could be excluded from the only State supported law school. This Court assumed that the validity of equal facilities in racially separate schools was settled by earlier decisions and cited the *Plessy* case, *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151 (1914), both of which involved segregation only in public carriers, and the *Gong Lum* case. But the validity of segregation was not decided.

The most recent consideration of this problem was in 1948 in the University of Oklahoma Law School case, *Sipuel* v. *Board of Regents of the University of Oklahoma*, 332 U. S. 631 (1948). This Court, in a *per curiam* decision, said that the State must provide law school facilities for the Negro petitioner "in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group" (at 633). The facts in the *Sipuel* case were similar to those in the *Gaines* case, in that no law school facilities were afforded Negroes by the State of Oklahoma.

Segregation was not at issue in the *Sipuel* case. This Court stated in *Fisher* v. *Hurst*, 333 U. S. 147, 150 (1948), that:

> The petition for certiorari in *Sipuel* v. *University of Oklahoma* did not present the issue whether a state might not satisfy the equal-protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On submission, we were clear it was not an issue here.

In no case previously before this Court in which racial separation in education has been the subject of comment in an opinion has there been a record presented upon which the Court felt compelled to take cognizance of the issue of segregation *per se* in State supported educational institutions.

The record in this case presents the issue squarely:

Does segregation in State supported educational institutions meet the requirements of the "equal protection" clause of the Fourteenth Amendment?

POINT II

Inequality is an inevitable concomitant of segregation of racial groups in public educational facilities and as such violates the "equal protection of the laws" provision of the Fourteenth Amendment.

This Court is now being asked to decide whether it will penetrate the fiction of the "separate but equal" doctrine and examine into the true nature of equality. For what is being pressed upon this Court and upon our constitutional democracy by the State of Texas is a spurious concept which insists that equality can exist even though racial groups are kept rigidly compartmentalized in separate institutions of learning, denied the social and intellectual relationships which are the true well-spring of a democratic education.

It seems ironic that so late in the history of our American democracy we are still considering this question. The great Fourteenth Amendment, on which we rely, was meant to guarantee rights to the Negro which would make these deliberations unnecessary. But the Fourteenth Amendment, which was meant to destroy the "established usages, customs, and traditions of the people" which survived slavery, was used to preserve and fortify them. *Plessy* v. *Ferguson*, 163 U. S. 537, 550, 551 (1896). Instead of the equality guaranteed the Negro, there came forth from the *Plessy* case inequality in the form of separation of racial groups.

Today no one can deny that the Fourteenth Amendment prohibits discrimination because of race. This Court has in recent times attacked again and again State action which has discriminated against groups simply on the basis of their racial origin. This Court has, for

instance, declared that State courts cannot constitutionally enforce racial restrictive covenants, *Shelley v. Kraemer*, 334 U. S. 1 (1948); it has struck down as unconstitutional a racially discriminatory presumption in the California Alien Land Law, thus rendering the law ineffective and giving rise to State court decisions which have gone even further, *Oyama* v. *California*, 332 U. S. 633 (1948); it has forbidden California to use racial ineligibility for citizenship as a means for preventing Japanese from earning their living as commercial fishermen, *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948); it has repeatedly refused to allow the exclusion of Negroes from grand and petit juries on the basis that to do so would be a denial of the equal protection of the laws, *Patton* v. *Mississippi*, 332 U. S. 463 (1947).

The opposition of this Court has been enhanced where the discrimination, as in this case, has been "rooted deeply in racial, economic and social antagonisms," *Oyama* v. *California*, 332 U. S. 633, 662 (1948) and this Court has firmly stated, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

As Mr. Justice Murphy said in his concurring opinion in the *Oyama* case,

> The Constitution of the United States, as I read it, embodies the highest political ideals of which man is capable. It insists that our government, whether state or federal, shall respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin or the nature of his beliefs. It thus renders irrational, as a justification for discrimination, those factors which reflect racial animosity. (at 663)

In most of the cases cited, discrimination by the State was acknowledged and justification attempted. But here, "discrimination" is not acknowledged. The "separate but equal" doctrine relied on is pernicious because it is far more subtle. Segregation is not discrimination, it says, where equal facilities are provided for the segregated groups. The premise of *Plessy* is that compulsory segregation does "not necessarily imply the inferiority of either race to the other."

But can such sophistry sanctify the practices of segregation? Do they afford a segregated race "equal protection of the laws" under the Fourteenth Amendment in the face of the many injunctions of this Court that State created and enforced racial distinctions are odious and unconstitutional?

It is our contention that segregation *is* discrimination. The history of the Fourteenth Amendment reveals that its framers believed segregation to be discrimination. Our social scientists have conclusively established that segregation is discrimination. Unless we are merely paying lip service to the "highest political ideals of which man is capable" we must recognize that segregation does not "respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin" and thus should be forbidden.

The web of discrimination is indeed a tangled one. Economic discrimination cannot be dissociated from political discrimination. Intellectual discrimination cannot be pried loose from social discrimination. All have their effect on the emotional development of the individual, as well as on his physical and material opportunities.

The "separate but equal" doctrine, especially as applied to education, is an illusion because physical equality (in the form of buildings, libraries, number of teachers and

students, and the like) is actually non-existent. More important, it can never exist side by side with segregation in the face of social and economic realities.

Even should it be true that physical equality is possible, segregation is discrimination nevertheless for, in spite of the false premise of the *Plessy* case, segregation does imply social inferiority with all of the resultant evil effects. In addition, segregation works a severe disadvantage, particularly to Negroes, since they are deprived of the fullness of intellectual and social relationship which is necessary for full equality in education.

A. *Social Inequality*: Mr. Justice Frankfurter in his recent concurring opinion in *McCollum* v. *Board of Education*, 333 U. S. 203, 216 (1948), has pointed out that the State supported public school is "designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people * * *" This was also stressed in *Mendez* v. *Westminster School Dist.*, 64 F. Supp. 544, 549 (S. D. Cal. 1946) where it was declared that: "A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage."[2] This federal district court decision, affirmed by the Ninth Circuit Court of Appeals on other grounds, 161 F. (2d) 774 (1947), is a happy portent of a growing realization that social inferiority is implicit in a dual school system, even were physically equal facilities provided for each group. Where there are separate schools for whites and Negroes, as is the case here, it is obvious that the Negro school is socially inferior. If the opposite

[2] This Court is recommended to Note, Segregation in Public Schools—A Violation of "Equal Protection of the Laws," 56 YALE L. J. 1059 (1947) for a discussion of the *Westminster* case and a skillful analysis of the problem of segregation in education.

point of view were not enshrined in the glosses on *Plessy v. Ferguson*, this Court might even take judicial notice of it. Our social science literature impressively documents that fact.[3] The "equal protection of the laws" provision of the Fourteenth Amendment certainly does not preclude social equality. Rather, it guarantees it.

B. *Intellectual Inequality*: Were we to concede *arguendo* that the "separate but equal" doctrine is applicable to railroad transportation, as was held in the *Plessy* case, we would still maintain that the *Plessy* doctrine is inapplicable to education. While a Negro travelling on a train can arrive at his destination at the same time as his white fellow passenger (though he might not have had as comfortable a seat), a Negro segregated in a Negro school cannot travel as far or as fast educationally as his white fellow students, especially in legal education.

Essential to the educational process is the interplay of contributions from all persons and all groups. Full equality in education is not attainable unless all students, regardless of race, have the fullest opportunity to associate intellectually with each other, to express and receive the divergent points of view which arise from their differing social backgrounds.

Negroes especially need this intellectual interplay because in most instances they have been subjected to depressed educational standards. The development of adequate educational facilities for Negroes is greatly handicapped by their isolation from the white community.

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[3] See, for instance, DAVIS AND DOLLARD, CHILDREN OF BONDAGE (1940); DOLLARD, CASTE AND CLASS IN A SOUTHERN TOWN (1937); GALLAGHER, AMERICAN CASTE AND THE NEGRO COLLEGE (1938); BOND, EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER (1934).

This is not to mention the deprivation to the white student of intellectual association with the Negro student. Nor are these mutual deprivations an indication of equality. As this Court has but lately observed in *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948), "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

Education for the legal profession requires the highest of standards. The study of law traverses many fields of human knowledge. Yet the Negro relegated to a jim-crow law school finds that there is an insufficient number of students to furnish the broad cross-section of intellectual interests and proficiencies which are essential ingredients of successful law school training.

Law school classes are most stimulating where they afford ample group discussion, as every member of this Court knows. It is a hopeless task to attempt to study law alone, as the petitioner is being compelled to do. Even were there a large enrollment at the Negro law school, the facilities for discussion among students would be limited and the Negro student deprived of needed intellectual challenges from white fellow students often better educated than he.

In addition to this, the segregated Negro is deprived of the opportunity of participating with white students in their law review, in moot courts and mock trials, in such practice as is afforded by legal aid clinics and public defender societies and in all of the activities which make up a rounded legal education outside of the classroom.

C. *Physical Inequality*: Wherever there is racial segregation in education the physical facilities afforded Negroes are substantially inferior to those enjoyed by whites.

The President's Commission on Higher Education has found that:

> * * * the separate and equal principle has nowhere been fully honored. Educational facilities for Negroes in segregated areas are inferior to those provided for whites. Whether one considers enrollment, over-all costs per student, teachers' salaries, transportation facilities, availability of secondary schools, or opportunities for undergraduate and graduate study, the consequences of segregation are always the same, and always adverse to the Negro citizen.[4]

Separate facilities have not been equal, are not equal, and can never be equal.

As matters stand today, the dual educational system supposedly sanctioned by the "separate but equal" doctrine often represents a saving to those communities which segregate because less funds are expended on Negro schools. The "separate but equal" concept is impossible of achievement in most communities because the maintenance of a hypothetically equal dual school system would require heavy tax increases well beyond the financial capacities of practically every community.

In 1939-40 the average expense in nine southern States for white students was almost 212% greater than the average expense for Negro students. This pattern is substantially the same in all States which segregate.[5]

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[4] HIGHER EDUCATION FOR AMERICAN DEMOCRACY: Vol. II, Equalizing and Expanding Individual Opportunity 31 (1947).

[5] BLOSE AND CALIVER, STATISTICS OF THE EDUCATION OF NEGROES: A DECADE OF PROGRESS, 6, Table 8 (1944); BLOSE AND ALVES, STATISTICS OF STATE SCHOOL SYSTEMS, 1939-40 and 1941-42, U. S. Office of Ed.; Biennial Survey of Education in the United States 37, Table XXI (1944); Worth, L., *The Price of Prejudice*, SURVEY GRAPHIC, Jan. 1947, 19-21.

Expert testimony in the record shows that the State of Texas regularly spends substantially less for Negro than for white education. The total assets of white institutions of higher learning amount to $28.66 for each white person in the State, but the assets of Negro schools amount to only $6.40 per Negro. The whites have almost four and a half times as much in total educational institutional assets per capita of the population as do the Negroes (R. 244).

In 1943-44, a typical year, Texas appropriated approximately $11,000,000. in State, county and district funds for higher education. Of this amount, about $10,800,000. went to white institutions, or $1.98 per capita of white population in the State. The balance went to Negro institutions, or the equivalent of 23¢ per capita of Negro population in the State. On this basis, white institutions of higher learning received eight times as much as Negro institutions (R. 246).

On any basis of calculation, whether per capita or per student, there is a glaring disparity between the provision of State funds for institutions of higher learning for whites as compared to that for Negroes. As a consequence of such differences, the Negro has been educationally disadvantaged over the years in Texas.

This is as true of legal education for Negroes in the State of Texas as it is in other fields of higher learning. Testimony in the trial court showed that the State of Texas provided a law school for the petitioner by leasing a suite of three rooms and toilet facilities in an office building for a period beginning March 1, 1947, and ending August 31st of that same year (R. 29, 41). These quarters were in the semi basement of the building (R. 88). One room was to be a reading and office room and the other two were intended as classrooms. There was no

private office or faculty room for any instructor, for any administrative personnel, or for a dean (R. 47). Nor was there space for a library consistent with the needs of a law school. Some 200 text books were available on the premises to serve as a library (R. 21). There was no librarian (R. 96). It was a self-service library.

The faculty consisted of three instructors assigned part-time from the University of Texas Law School (R. 92-93). Admittedly, the school established for the petitioner did not meet the requirements set by the Association of American Law Schools for accreditation (R. 92).

The State of Texas contends that this racially segregated law school affords facilities equal to those enjoyed by white students at the University of Texas Law School. But it is quite obvious that the Negro law school cannot possibly afford even a minimal legal education. To claim that it is "equal" to the University of Texas Law School is sheer hypocrisy.

It might be contended that while educational facilities have been and are, in fact, unequal, equality is nevertheless theoretically possible. But educational plants, like other physical facilities, deteriorate at varying rates. To maintain physical equality in a segregated educational system, it would be necessary to continually balance the facilities of one system against the other and to take steps to eliminate inequalities which necessarily develop from time to time. This is administratively impossible. Physical equality can be achieved only when the walls separating the two systems are destroyed and students, regardless of race or color, are permitted to use all available educational facilities.

D. *Economic Inequality*: The educationally segregated Negro is also subject to economic discrimination.

Dr. Robert Redfield, an expert on education, testified that occupational inequalities result from segregation (R. 194-200). The graduate of a Negro law school lacks the prestige which comes from graduation from an accredited and highly regarded law school. This prestige carries through in later professional life, and has a pecuniary value. In addition, the denial of free social relationships is a serious economic as well as social deprivation. The legal profession is one in which social contacts are all-important and the law school is an institution in which are formed friendships and relationships which shape the course of men's careers. Economic opportunities spring from social relationships and the practice of law itself is often eased because of friendships formed in law school. The Negro student, denied these relationships, will probably end up as a second-class lawyer as well as a second-class citizen.

We submit that the *Plessy* case, upon which the legal structure of segregation is built, can itself be considered authority for the view that segregation is a denial of "equal protection of the laws" if we conclude that its basic premise (that compulsory segregation does "not necessarily imply the inferiority of either race to the other") is invalid in the light of our present sociological and psychological insights. For the *Plessy* case itself recognized that the "exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good and not for the annoyance or oppression of a particular class" (at 550).

This Court is met with a tremendous challenge. The challenge is presented in the form of a doctrine which has for over fifty years made it possible for us to pay lip-

service to constitutional guarantees while at the same time flagrantly denying them.

The "separate but equal" doctrine has persevered despite common recognition that it is "one of the outstanding myths of American history."[6]

This Court is asked to grant a petition for writ of certiorari in order that it may decide this momentous question which has national as well as international implications.

The "separate but equal" doctrine traduces the concepts of equality which are protected by the Fourteenth Amendment. The results of this doctrine have been physical, social, intellectual and economic inequality. It must be struck down.

POINT III

A decision on the issue of racial segregation in public educational facilities presented for review by this Court is of paramount significance to the welfare of the Nation.

The welfare of the nation requires that the Court grant this petition for a writ of certiorari, and review the question whether racial segregation in public educational institutions is consonant with the constitutional principle which provides for equal protection of the laws.

[6] To Secure These Rights: The Report of the President's Committee on Civil Rights 81 (1947).

A. Racial segregation in educational institutions causes a tremendous waste of our human resources.

The cost of segregation to the Negro race, to the South, and to the entire country has become increasingly and glaringly evident.

Segregation has seriously depressed the level of education for a large part of our population. Our economy suffers substantially because of educational segregation. We have lost, and are continually losing, an important potential of manpower for industry and science. We lose also sources of leadership in government, in the professions and in other important areas.

In the most recent decennial census, that of 1940, an attempt was made for the first time to obtain information about the level of schooling of the American population. The census showed a surprising amount of illiteracy.

In the seventeen States of the South and in the District of Columbia, where separate schools for whites and Negroes are maintained, 2.8% of the native white and 11.7% of the Negro population twenty-five years of age and older had not attended school for even one year. Thirty-seven per cent of the Negroes of the South were classed as functional illiterates. This is in contrast to eleven and one-half per cent of whites.[7]

Evidence indicates an alarming deprivation of professional services in the State of Texas. The failure to provide equal educational facilities because of segregation is in large measure responsible for this. Testimony at the trial of this case drawn from 1940 U. S. Bureau of Census figures revealed that in Texas there were 6,076 white doctors, or a ratio of one to every 903 of white population, but

[7] Thompson, *The Availability of Education in the Negro Separate School*, 16 J. OF NEGRO ED. 263-268 (1947).

only 164 Negro doctors, of one Negro doctor for every 5,637 Negroes (R. 253). There were 1901 white dentists in the State, but only 81 Negro dentists. The ratio of white dentists to white population was one to every 2,886, but there was an average of only one Negro dentist for every 11,412 Negroes (R. 253). The disparity in the field of engineering was shown to be even greater. There were 8,961 white engineers, but only 6 Negro engineers in Texas (R. 254). In the legal profession, with which this case is concerned, there were but 23 Negro lawyers in the entire State as against 7,701 white lawyers. The ratio of white lawyers to white population was one to 712. The ratio among Negros was one to 41,191 (R. 254).

What is true of Texas is true in every area where racially segregated school systems are maintained.[8]

The evil effects of segregation upon the national welfare have been summed up by the President's Commission on Higher Education:

> Denial of educational opportunity restricts the preparation of the individual for effective living. It is a limiting factor also in our national welfare. Never has our country been faced with so many and so significant problems which require the highest quality of leadership. The importance of a larger supply of intellectual eminence has been demonstrated abundantly in the physical and biological sciences. Equally well-educated leadership is necessary in our economic, social, and political life. Issues related to conservation and development of natural resources, to labor-management relations, to trade and commerce, must all be resolved in terms of the public interest.[9]

[8] *See* Thompson, *Some Critical Aspects of the Problems of the Higher and Professional Education for Negroes*, 14 J. OF NEGRO ED. 509, 511 ff. (1945).

[9] REPORT OF THE PRESIDENT'S COMMISSION ON HIGHER EDUCATION: Vol. II, HIGHER EDUCATION FOR AMERICAN DEMOCRACY, 8.

B. Racial segregation in educational institutions is a threat to our leadership in international affairs.

The continued preeminence of the United States in world leadership depends, in large measure, upon the moral and material resources at our command.

We have undertaken by international agreements obligations to insure democratic treatment of all groups within our midst.[10] We have subscribed to the Universal Declaration of Human Rights of the United Nations which provides, in Article 26, that "[t]echnical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit." The Article provides further that:

> Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups. * * *

Moreover, we are now engaged in an ideological world conflict in which the practices of our democracy are the subject of close scrutiny abroad. We cannot afford to rest upon democratic pretensions unrelated to reality. It is no answer to the colored peoples of the world, whose favor and assistance we solicit, that we assure equality of treatment to all races by way of the expedient "separate but equal" doctrine. The evidence is overwhelming that "separate" has never been and can never be "equal" in any meaningful sense of the word.

[10] United Nations Charter, Article 2, par. 2; 55, 56. Declaration on Reciprocal Assistance and American Solidarity, commonly known as the Act of Chapultepec, March 3, 1945. Universal Declaration of Human Rights, approved by the United Nations General Assembly, Dec. 10, 1948, Articles 2, 7, 26.

As to material resources, in addition to those already discussed, we lose the services of personnel in every field of endeavor. Even on the level of fighting manpower we are deprived, by educational deficiencies, from the full use of our potential.

Our experience during World Wars I and II proved that the educational inequities created by the policy of segregation not only deprive the individual Negro citizen of nationally needed occupational skills, and the Negro community of the leadership and professional services it so urgently needs, but also the nation of large numbers of men who would otherwise be available for the armed services.

The Selective Service records of World War II show that in the critical period of the war, when the need for manpower was urgent, over one-third of the rejections of Negroes for military service was for educational deficiencies, while only one-twelfth of the whites rejected failed to meet the minimum educational standards.[11]

General Hershey, who was the Selective Service Administrator during World War II, stated that the very much higher rate of illiteracy for Negroes as compared to whites exists "not because Negroes resist education or for any other reason than that *educational opportunities just are not available to them.*"[12] (Italics added.)

[11] The Black and White of Rejections for Military Service. American Teachers Ass'n. Montgomery, Ala. (1944) 5.

[12] Selective Service in Peacetime. First Report of the Director of Selective Service. 1940-41 (Washington, 1942) 259.

C. Unless racial segregation in educational institutions is declared constitutionally invalid now, we can expect a further crystallization of patterns of discrimination.

There is an additional reason which should impel the Court to decide the issue presented by this case as soon as possible.

At a Conference of Southern Governors held at Tallahassee, Florida, in February 1948, the States of Alabama, Arkansas, South Carolina, Florida, Georgia, Maryland, Mississippi, Tennessee and Texas, proposed the establishment of regional universities, in an attempt to meet the previous mandate of this Court that Negroes be offered educational facilities equal to those afforded whites in the same States. It was agreed that there would be established a geographical district embracing fifteen Southern States with cooperatively owned and operated regional schools to provide higher education for Negroes on a segregated basis.

The Southern governors requested Congressional approval of this agreement.[13] This regional compact was put aside for the time being when the Senate by a vote of 38 to 37 approved a motion to send the resolution back to committee for further study.

In the middle of December 1948, the governors of eleven Southern States, and Southern educators, met in conference at Savannah, Georgia, to implement the regional school plan even though it had not been favorably acted upon by the Senate.

On December 13, 1948, it was announced that the Regional Council for Education, meeting in conjunction with the Southern Conference of Governors, had approved

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[13] Senate Joint Resolution 191, and House Resolution 334, 80th Cong., 2nd Sess.

plans and allocated funds to begin regional cooperation in graduate and professional education in the South. The program called for the expenditure of a considerable sum of money for the years 1949-51.

Considerable expenditure of effort and money is planned for the regional school project in the next two years.[14] Since the implementation of the regional school plan would have the effect of establishing the principle of segregation more firmly than ever in the social order of the South, it is, therefore, incumbent upon this Court to decide now whether racial segregation in education is violative of the equal protection clause of the Fourteenth Amendment.

CONCLUSION

For the reasons urged herein we respectfully request that the petition for writ of certiorari to review the judgment of the Court below be granted.

Respectfully submitted,

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Dated New York, N. Y., May 24, 1949.

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[14] 17 J. OF NEGRO ED. 101-105 (1948).

APPENDIX

American Jewish Committee

The American Jewish Committee is a corporation created by an Act of the Legislature of the State of New York in 1906. Its charter states:

> The object of this corporation shall be to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto . . .

During the forty-three years of our existence it has been one of the fundamental tenets of our organization that the welfare and security of Jews in America depend upon the preservation of constitutional guarantees. An invasion of the civil rights of any group is a threat to the safety of all groups.

For this reason we have on many occasions fought in defense of civil liberties even though Jewish interests did not appear to be specifically involved. The present case, involving segregation in state-supported educational institutions, is one with which we are deeply concerned because such discrimination deprives millions of persons of rights that are freely enjoyed by others and adversely affects the entire democratic structure of our society. A question of transcendent public importance is thus presented to this Court.

B'nai B'rith (Anti-Defamation League)

B'nai B'rith, founded in 1843, is the oldest civic organization of American Jews. It represents a membership of 300,000 men and women and their families. The Anti-Defamation League was organized in 1913, as a section of the parent organization, in order to cope with racial and religious prejudice in the United States. The program developed by the League is designed to achieve the following objectives: to eliminate and counteract defamation and discrimination against the various racial, religious and ethnic groups which comprise our American people; to counteract un-American and anti-democratic activity; to advance goodwill and mutual understanding among American groups; and to encourage and translate into greater effectiveness the ideals of American democracy.

National Citizens' Council on Civil Rights

The National Citizens' Council on Civil Rights is a voluntary association of prominent Americans organized in 1948 for the following express purposes:

1. To promote public understanding and support of the findings and recommendations contained in the Report of the President's Committee on Civil Rights which includes the recommendation that segregation be eliminated from American life.
2. To encourage local community action for improvement in the observance of civil rights for all citizens; to stimulate the formation of local councils on civil rights and the undertaking of local community audits.
3. To improve public understanding of the need for permanent Commissions on Civil Rights.

The membership of the Council represents the widest possible cross-section of American democratic opinion. It believes that our traditional American heritage points the way to a future greater realization of civil rights. And it believes these rights can best be won in our own backyard.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. [redacted] 44

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *et al.*

BRIEF OF AMERICAN VETERANS COMMITTEE (AVC) Amicus Curiae

IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PHINEAS INDRITZ,
PAUL DOBIN,
JOSEPH McDOWELL,
JEROME H. SPINGARN,
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Attorneys for American Veterans Committee Amicus Curiae

MAY 25, 1949,
Washington, D. C.

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TABLE OF AUTHORITIES

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Chicago, R. I. & P. Ry. Co. v. *Allison*, 120 Ark. 54, 178 S. W. 401 (1915)	8
Collins v. *Okla. State Hospital*, 76 Okla. 229, 184 Pac. 946 (1919)	8
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Myrdal, Gunnar, *An American Dilemma, The Negro Problem and American Democracy*, vol. 1, p. 581 (1944) 10

President's Commission on Higher Education, Report of, *Higher Education for American Democracy* (Govt. Printing Off., Dec., 1947), vol. II, p. 31 9

President's Committee on Civil Rights, Report of, *To Secure These Rights* (Oct. 29, 1947) 3, 9

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SWEATT v. PAINTER

OCTOBER TERM, 1948

No. 667

BRIEF OF AMERICAN VETERANS COMMITTEE (AVC) Amicus Curiae

The American Veterans Committee, Inc. (AVC), as *amicus curiae* respectfully requests this Court to (1) grant Sweatt's petition for certiorari, (2) specifically request argument with respect to the terms of the mandate which should be issued if the decision below is reversed, and (3) give special consideration to the nature of the mandate upon such reversal.

The American Veterans Committee, Inc. (AVC) is an organization of veterans of World War II who have associated themselves to promote the democratic principles for which they fought, including the elimination of racial discrimination.[1] AVC believes that the racial discrimina-

[1] AVC's basic aims are set forth in the Preamble to the AVC Constitution adopted at its First National Convention at Des Moines, Iowa, June 14-16, 1946:

"We as veterans of the Second World War associate ourselves regardless of national origin, creed or color for the following purposes:

"To preserve the Constitution of the United States; to insure the rights of free speech, free press, free worship, free assembly and free elections; To provide thorough social and economic security to all; To maintain full production and full employment in our country under a system of private enterprise in which business, labor, agriculture and government cooperate; To promote peace and good will

tion perpetrated by the State of Texas and permitted by the court below is incompatible with our democratic faith and is inimical to the welfare of the United States.

Sweatt applied for admission to the University of Texas Law School on February 26, 1946. He measured up to the required standards for admission scholastically and in all other respects except that of race. He was refused admission only because of his race. Subsequently, after protracted litigation, the State of Texas set up an inferior make shift "law school" for him. If Sweatt were a white man he would have been admitted to the University of Texas Law School years ago and would by now probably have been graduated. White qualified applicants who had applied at the same time as Sweatt are now practicing law. The refusal by the State of Texas to permit his admission to the University of Texas Law School thus raises important and fundamental questions with respect to the nature of the State's obligations to afford Negroes a legal education on the same conditions as such education is afforded to white persons.

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among all nations and all peoples; To support active participation of this nation in the United Nations and other world organizations whose purposes are to improve the cultural, commercial and social relations of all peoples; To provide such aid to disabled veterans as will enable them to maintain the position in society to which they are entitled; To provide such financial, medical, vocational and educational assistance to all veterans as is necessary for complete readjustment to civilian life; To resist and defeat all attempts to create strife between veterans and non-veterans; and to foster democracy. We dedicate ourselves to these aims, and for their attainment we establish this Constitution."

AVC's views in recent civil right cases before this Court are set forth in *amicus curiae* briefs in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948); *United States* v. *C. I. O.*, 335 U. S. 106 (1948); and *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949).

I. SPECIAL SIGNIFICANCE OF THIS CASE FOR VETERANS

This case has special significance for veterans. Both Negroes and whites served with distinction in the armed forces of the United States all over the world during World War II.[2] In recognition of their sacrifices and service, Congress granted educational benefits to them in the Servicemen's Readjustment Act of June 22, 1944, popularly known as the "G. I. Bill of Rights" (58 Stat. 284, as amended, 38 U. S. C. 693, Veterans' Regulation No. 1, part VIII, following 38 U.S.C. 739). In this Act, Congress made no distinctions as to race with respect to the veterans who could secure the benefits of the Act. These benefits will expire in a few years. For almost all of these war veterans, the last day they will be allowed to initiate study under the G. I. Bill of Rights is July 25, 1951, and no education or training will be afforded to them under that act after July 25, 1956. The refusal by certain states, as by Texas in this case, to admit Negroes to state institutions of higher learning on an equal basis with whites is not only repugnant to the Fourteenth Amendment but also frustrates the Congressional purpose that all veterans shall have equal opportunity to obtain the educational benefits which they have earned by their war-time services to the nation. Effectuation of the Congressional policy in this respect requires that the doors of existing state institutions for higher education be opened forthwith to Negro as well

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[2] *Army Service Forces Manual* M-5, "Leadership and the Negro Soldier" (Oct. 1944), pp. 9, 10, 23, 74-95; *To Secure These Rights*, The Report of the President's Committee on Civil Rights, pp. 83-84 (Govt. Printing Off., Oct. 29, 1947). Before voluntary enlistments were stopped in World War II, Negroes had volunteered for military service in ratios far exceeding their ratios in the nation's population. *Army Service Forces Manual* M-5, *supra*, p. 5. Inquiry from the Veterans Administration indicates that over 1,275,000 veterans of World War II are non-white.

as to white students. Equality of enjoyment of the educational benefits conferred by the national government upon the nation's veterans can be secured in no other way.

II. THE APPLICABILITY OF THE DOCTRINE OF "SEPARATE BUT EQUAL" TO EDUCATION HAS NEVER BEEN DECIDED. PLESSY v. FERGUSON DID NOT DO SO; AND ITS RATIONALE IS INCONSISTENT WITH THE FOURTEENTH AMENDMENT.

The courts of Texas justified the State's refusal to admit Sweatt to the University of Texas Law School on the theory that the State may fulfill its constitutional obligation to Negroes by providing them equal facilities in separate schools, and on the assumption that the State had actually provided Sweatt with the same opportunity for a legal education as is afforded to a white person. That theory and that assumption should, we believe, be reviewed and rejected by this Court in the light of the facts presented in this case.

The foundation for the decision below is *Plessy* v. *Ferguson*, 163 U. S. 537 (1896). That case involved a Louisiana statute requiring segregation of whites and Negroes on an intrastate train and is commonly regarded as the leading case sanctioning "separate but equal" facilities as sufficient under the Equal Protection Clause of the Fourteenth Amendment.

We do not believe that *Plessy* either involved or decided the issue in this case.

(1) In *Plessy*, both whites and Negroes, although separated, were on the same train and at least would arrive at their common destinations at the same time. (Compare *Railroad Company* v. *Brown*, 84 U. S. (17 Wall.) 445, 452 (1873) in which this Court held that providing separate cars

on the same train for whites and Negroes is "discrimination in the use of the cars.") In this case, however, Sweatt is *excluded* from the only real Law School in the State solely because he is a Negro.

(2) In *Plessy*, the Court was not presented with factual evidence either as to the reasonableness of distinctions based solely on race or as to inequalities which result from racial segregation. In this case, however, the evidence conclusively demonstrates that there is no reasonable basis for the compulsory exclusion of qualified applicants from the Law School solely on the basis of race and that the so-called segregation here involved results in gross inequalities in the opportunity to acquire a legal education.

(3) *Plessy* did not expound a general rule that "separate but equal" is equal protection in every area of human relations. Actually, *Plessy* correctly stated that it would be unconstitutional for a State to make unreasonable distinctions between white and colored people, such as "to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color." (163 U. S. 537, 549-550). The application of this very standard to the facts of this case condemns the refusal of Texas to admit qualified applicants to its University Law School solely on grounds of color.

(4) The precise holding in *Plessy* was that a statute requiring the partitioning of white and colored people in an intrastate railroad train was not invalid under the Equal

Protection Clause. *Plessy* did not involve a statute requiring either the separation of races in the same school or the setting up of separate schools for white and colored students. Although the Court's opinion in *Plessy* contains words approving separate schools for white and colored, those words were obviously *dicta*—*dicta* based largely on *Roberts* v. *Cushman*, 5 Cush. (Mass.) 198 (1849), a case decided *before* the Civil War and *before* the Fourteenth Amendment.

Nor has this Court in any other case ever directly passed upon the validity of racial segregation in schools, or, more precisely, the validity of statutes requiring separate schools for white and colored. See BRIEF FOR THE UNITED STATES AS AMICUS CURIAE, ftnt. 31, p. 59, in *Shelley* v. *Kraemer* and *Hurd* v. *Hodge*, Oct. Term, 1947, Nos. 72, 87, 290 and 291; 334 U. S. 1 and 24 (1948).

In any event, if the holding in *Plessy* is deemed applicable to this case, we believe that *Plessy* should be overruled.

The foundations of the *Plessy* case have now all been undermined. It is clear now that *Plessy* is inconsistent with the guaranties of the Fourteenth Amendment. As this Court said in *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1880), the Fourteenth Amendment contains "a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored; exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

The *Plessy* holding that segregation on intrastate trains is compatible with the Equal Protection Clause was based on two major erroneous assumptions.

(1) *Plessy* erroneously assumed that the distinction between whites and Negroes, on trains, rested on valid factual

differences and was "a reasonable regulation" with respect to which the State "is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order" (p. 550). The unsoundness of that assumption has been conclusively demonstrated by the anthropological, educational, sociological and international developments from 1896 to 1949. Furthermore, it is obvious that the very purpose of the Fourteenth Amendment was to prevent the use of State authority to impose racial distinctions based on "established usages, customs and traditions." Moreover, this Court has clearly established, in the housing segregation cases, that State-imposed racial segregation cannot be "justified as proper exertions of state police power" for the "preservation of the public peace." *Shelley* v. *Kraemer*, 334 U. S. 1, 21 (1948); *Buchanan* v. *Warley*, 245 U. S. 60, 81 (1917). In addition, this Court has in recent years eloquently expressed the Constitutional infirmity of racial distinctions by government authority and has firmly established the principle that "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943); see *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948); *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 94 (1945); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886).

(2) The second erroneous assumption underlying *Plessy* was in the court's denial that "enforced separation of the two races stamps the colored race with a badge of inferiority" (p. 551). The fact is, however, that equal treatment is never seriously intended under a system of segregation.

The very purpose of racial segregation laws is to impose a symbolic superior-inferior caste system based on race which is totally independent of rational proofs or disproofs of any individual's capacities or abilities. The imposition of such caste status is itself discriminatory. Southern courts candidly recognize this when they award damages for "humiliation" to a white person who has been compelled to ride in the Negro section of a train,[3] or when they award damages to a white person who has been called "Colored."[4]

However, whatever may be said about the "equality" of segregated travel facilities on the same train, it is clear that the very fact of segregation in education by way of separate schools (complete *exclusion* from the University of Texas Law School in this case) results in inequalities of the opportunity to learn. Separation on a train, however obnoxious, cannot be equated with, nor its previous tolerance permitted to justify, racial discrimination in the opportunity to acquire a professional education, to raise one's status through education, and with that education to serve the community and the Nation. The record in this case proves that equal opportunity to acquire the knowledge, skills and techniques of the lawyer depends not only on instruction but on the association with fellow students of all races, creeds and walks of life. Indeed, whites as well as Negroes suffer from the denial of the opportunity to receive legal instruction in association with students of other races. No case previously before this Court has presented the situation where on the record it has been demonstrated that racial

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[3] *Louisville & N. R. Co.* v. *Ritchel*, 148 Ky. 701, 147 S. W. 411 (1912); *Missouri, K. & T. Ry. Co. of Texas* v. *Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327 (1901); *Chicago, R. I. & P. Ry. Co.* v. *Allison*, 120 Ark. 54, 178 S. W. 401 (1915).

[4] *Flood* v. *News & Courier Co.*, 71 So. Car. 112, 50 S. E. 637 (1905); *Wolfe* v. *Georgia Ry. & Electric Co.*, 2 Ga. App. 499, 58 S. E. 899 (1907); *Collins* v. *Okla. State Hospital*, 76 Okla. 229, 184 Pac. 946, 947 (1919).

separation in education cannot supply equal education. This case squarely presents that situation for the first time.

Segregation means discrimination. This fact is commonly known. Both the Record in this case and every survey of the problem have proved it. The President's Committee on Civil Rights stated in its Report, *To Secure These Rights*, pp. 81-82; (Oct. 29, 1947):

> "Segregation has become the cornerstone of the elaborate structure of discrimination against some American citizens. Theoretically this system simply duplicates educational, recreational and other public services, according facilities to the two races which are 'separate but equal.' In the Committee's opinion this is one of the outstanding myths of American history for it is almost always true that while indeed separate, these facilities are far from equal. Throughout the segregated public institutions, Negroes have been denied an equal share of tax supported services and facilities. . . . No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group."

The President's Commission on Higher Education in its Report of December 11, 1947 (*Higher Education for American Democracy*, Vol. II, p. 31, Govt. Printing Off.) stated, in a section entitled *The Impact of Segregation on Higher Education for Negroes*:

> ". . . the separate and equal principle has nowhere been fully honored. Educational facilities for Negroes in segregated areas are inferior to those provided for whites. Whether one considers enrollment, over-all costs per student, teachers' salaries, transportation facilities, availability of secondary schools, or opportunities for undergraduate and graduate study, the consequences of segregation are always the same, and always adverse to the Negro citizen."

Gunnar Myrdal, in his brilliant and comprehensive study of the American Negro, *An American Dilemma, The Negro Problem and Modern Democracy,* Vol. I, p. 581 (1944), stated:

> "It is evident, however, and rarely denied, that there is practically no single instance of segregation in the South which has not been utilized for a significant discrimination. The great difference in quality of service for the two groups in the segregated set-ups for transportation and education is merely the most obvious example of how segregation is an excuse for discrimination. Again the Southern white man is in the moral dilemma of having to frame his laws in terms of equality and to defend them before the Supreme Court—and before his own better conscience, which is tied to the American Creed—while knowing all the time that in reality his laws do not give equality to Negroes, and that he does not want them to do so."

III. THERE IS NO EQUALITY IN THIS CASE

A second, and somewhat narrower question in this case, assuming the validity and applicability to education of the so-called "separate but equal" doctrine, is the extent to which the State may create unequal opportunities for education and yet satisfy the requirements of the Constitution. We think it not subject to doubt that the accommodations offered Sweatt were far inferior to those of the University of Texas Law School and we think that under the decisions of this Court in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1939) and *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948), the State of Texas has failed to meet its constitutional obligation to the petitioner. If the decision of the court below in this respect is allowed to stand, the avenue would be open for all States to attempt to satisfy their obligations to supply equal education to Negroes by the "thin disguise" of makeshift and unequal schools.

IV. THE MANDATE WHICH WILL ISSUE TO IMPLEMENT THIS COURT'S DECISION

But AVC believes that the most important question presented in this case relates to the terms of the mandate that should be issued if this Court should reverse the decision of the court below.

Veterans, advanced in years by reason of their military service, must get their education *today* if at all, not at the termination of exhaustive legal proceedings. Veterans do not have the resources nor the time to file individual suits, eventually to be decided in this Court, and then start a subsequent suit on the meaning of the mandate, as occurred in *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948) and *Fisher* v. *Hurst*, 333 U. S. 147 (1948). If the constitutional promise of equality is to have meaning, it must mean actual equality of both the facilities and the time at which they are available. A decision which enunciates a bare theoretical requirement of equality, but leaves open to the courts below the opportunity for inequality in practice, cannot fulfill the constitutional requirement of equality. The interpretation which various states have placed on this Court's mandates in education segregation cases has virtually nullified the victory for nondiscrimination in education seemingly gained by this Court's decisions in *Missouri ex rel Gaines* v. *Canada, supra*, and *Sipuel* v. *Board of Regents, supra*. See *State ex rel. Gaines* v. *Canada*, 344 Mo. 1238, 131 S. W. (2d) 217 (1939); *Fisher* v. *Hurst*, 333 U. S. 147 (1948). The vitality of this Court's pronouncements on the Constitutional obligation of equality depends peculiarly, in this kind of case, on the nature of the mandate.

We believe that this Court's mandate should plainly require the State to admit Sweatt to the University of Texas

Law School at the opening of the next term following the issuance of the mandate.

AMERICAN VETERANS COMMITTEE

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IN THE

Supreme Court of the United States

October Term, 1949

No. 44

HEMAN MARION SWEATT,
Petitioner,

v.

THEOPHILIS SHICKEL PAINTER *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE FEDERAL COUNCIL OF THE CHURCHES OF CHRIST IN AMERICA

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On Petition for Writ of Certiorari to the Supreme Court of the State of Texas

---

MOTION ON BEHALF OF THE FEDERAL COUNCIL OF THE CHURCHES OF CHRIST IN AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

THE FEDERAL COUNCIL OF THE CHURCHES OF CHRIST IN AMERICA moves the Court for leave to file the brief *amicus curiae* hereto annexed, in support of the petition for a writ of certiorari. This brief is filed with the written consent of petitioner, but the written consent of the Honorable Price Daniels, the Attorney General of the State of Texas, has not been obtained although requested.

Dated, September 22, 1949.

THE FEDERAL COUNCIL OF THE CHURCHES OF CHRIST IN AMERICA

By: CHARLES H. TUTTLE
Counsel

IN THE

Supreme Court of the United States

October Term, 1949

No. 44

HEMAN MARION SWEATT,
Petitioner,

v.

THEOPHILIS SHICKEL PAINTER *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Texas

MEMORANDUM OF THE FEDERAL COUNCIL OF THE CHURCHES OF CHRIST IN AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION

Interest of The Federal Council *

This brief is filed on behalf of The Federal Council of the Churches of Christ in America, because of its profound interest in and concern with the legal, ethical and religious

* The Federal Council of the Churches of Christ in America is composed of the following religious bodies: National Baptist Convention, Northern Baptist Convention, Church of the Brethren, General Council of Congregational Christian Churches, Czech-Moravian Brethren, International Convention of Disciples of Christ, Evangelical and Reformed Church, Evangelical United Brethren Church, Five Years Meeting of the Friends in America, Religious Society of the Friends of Philadelphia and Vicinity, The Methodist Church, African M. E. Church, African M. E. Zion Church, Colored M. E. Church in America, Moravian Church, Presbyterian Church in U. S. A., Pres-

principles which, it is respectfully submitted, are challenged by the decisions of the courts below enforcing segregation as a result of the fact of race. Those decisions violate, we firmly believe, the constitutional guarantee of equal protection under law and also the free democratic principles and spiritual ideals which we profess as a nation.

The Position of The Federal Council—1946

The Federal Council has repeatedly declared its conviction that segregation enforced by law is a denial of the equal protection of the laws, of the dignity and inherent rights of the individual human being, and of the Christian concept of universal brotherhood. Such segregation, the Council affirms, necessarily predicates inferiority rather than equality; divisiveness instead of fellowship; stigma instead of dignity; prejudice and bias instead of mutual respect and good will; pretense and hypocrisy instead of good faith and sincerity in the social controls of opportunities to achieve an abundant life.

The present instance is, in the opinion of the Council, confirmation that the thesis of "separate but equal facilities" in the matter of public education tends to maintain a permanent pattern of imposed inferiority and subjection.

---

byterian Church in U. S., Protestant Episcopal Church, Reformed Church in America, Romanian Orthodox Church of America, Russian Orthodox Church of North America, Seventh Day Baptist General Conference, Syrian Antiochian Orthodox Church of North America, Ukrainian Orthodox Church of America, United Church of Canada, United Lutheran Church (consultative body), United Presbyterian Church.

The Presbyterian Church in the U. S. dissociates itself from this brief by vote of its representatives on the Council's Executive Committee.

The Official Statement approved by The Federal Council of the Churches of Christ in America in March 1946 on the subject of "The Church and Race Relations" declared (among other things):

"The Segregation Pattern Analyzed

"Segregation is the pattern of our American race relations. Segregation in America is the externally imposed separation or division of individual citizens, or groups of citizens, based on race, color, creed or national origin. It is accepted, with some differences of emphasis, in all sections of the country. It is sometimes established and supported by law. In other instances, segregation is almost as rigidly enforced by social custom.

"Segregation in America has always meant inferior services to the minority segregated. This pattern has never been able to secure equal, separate services to the minority segregated. Segregation is always discriminatory.

"Segregation is an expression of the inferiority-superiority pattern of opinions about race held tenaciously by the vast numbers of Americans. Segregation is not only the expression of an attitude; it is also the means by which that attitude is transmitted from one generation to another. Children of our society, observing minorities as we segregate them, cannot easily escape the conclusion that such minorities are inferior.

"Segregation as practiced in America probably has more effect on the racial opinions of the young than formal teachings of the schools about democracy, or of the Church about Christian brotherhood.

"Segregation as applied to our economic system denies to millions of our citizens free access to the means of making a living and sets for them insurmountable obstacles in their efforts to achieve freedom from want.

"In the greatest crisis in our history, segregation made it impossible to utilize fully large sections of our manpower in the armed services and war production. It also seriously limits the contributions of minority groups to the ongoing life of our people in the fields of art, education, science, industry, etc.

"Segregation subjects sections of our population to constant humiliation and forces upon them spiritual and psychological handicaps in every relation of life. This creates a yawning and ofttimes unabridged chasm in the quality of human fellowship and stands in contradiction to the higher American dream. Still more devastating is the moral and spiritual effect upon the majority.

"Segregation handicaps the nation in international relationships. It was a source of great embarrassment to our leaders that we found it difficult to locate an American community where racial practices were acceptable for establishing the headquarters of the United Nations Organization. This is a discouraging factor within our life as a nation as we begin to play our part in the new world unity upon which our future existence depends.

"Political segregation has disfranchised large numbers of our citizens, tending to create unnecessary confusion in dealing with important national issues, creating unreal political divisions and giving rise to a type of political demagoguery that threatens the very existence of democratic institutions.

"Segregation increases and accentuates racial tensions. It is worth noting that race riots in this country have seldom occurred in neighborhoods with a racially mixed population. Our worst riots have broken out along the borders of tightly segregated areas.

"The pattern of racial segregation in America is given moral sanction by the fact that churches and church institutions, as a result of social pressure, have so largely accepted the pattern of racial segregation in their own life and practice * * *.

"The Federal Council of the Churches of Christ in America hereby renounces the pattern of segregation in race relations as unnecessary and undesirable and a violation of the Gospel of love and human brotherhood. Having taken this action, the Federal Council requests its constituent communions to do likewise. As proof of their sincerity in this renunciation they will work for a non-segregated Church and a non-segregated society."

In a later Official Statement on the subject of "The Churches and Human Rights," adopted December 1948, The Federal Council of Churches stated (among other things):

"*Social, Economic and Political Rights*

"These rights, which should be available to all without discrimination as to race, color, sex, birth, social or economic status, or creed, include:

"A. Full opportunity to participate in the economic resources of the community, including:

"1. The right to a standard of living adequate for the welfare and security of the individual and the family.

"2. The right of every employable person to work under decent conditions, for fair compensation, and to be upgraded in keeping with character and ability; or to engage in an individual enterprise or profession.

"3. The right of all persons to organize into labor unions, corporate enterprises, cooperative ventures, and for social action.

"B. Full opportunity to participate on a non-segregated basis in the social and public life of the community, including:

"1. The right to wholesome living space.

"2. The right to move within one's country, and to leave and return to one's country.

"3. The right to educational and professional training and to cultural opportunities.

"4. The right to recreational opportunities and facilities.

"5. The right to participate in the use of community social services.

"6. The right to adequate health services.

"7. The right to the use of transportation on the basis of full equality.

"8. The right to receive equal service from businesses and persons serving the public, such as stores, theaters, hotels and restaurants."

This determined opposition to segregation was also part of a report received and commended to the churches in September 1948 by the First Assembly of the World Council of Churches at Amsterdam, Holland, attended by the representatives of 140 religious denominations. This report stated:

"Man is created and called to be a free being, responsible to God and his neighbor. Any tendencies in State and society depriving man of the possibility of acting responsibly are a denial of God's intention for man and His work of salvation.

• • •

"It (the Church) knows that it must call society away from prejudice based upon race or colour and from the practices of discrimination and segregation as denials of justice and human dignity, but it cannot say a convincing word to society unless it takes steps to eliminate these practices from the Christian community because they contradict all that it believes about God's love for all His children.

• • •

"The Church has always demanded freedom to obey God rather than men. We affirm that all men are equal in the sight of God and that the rights of men derive directly from their status as the children of God. It is presumptuous for the state to assume that it can grant or deny fundamental rights. It is for the state to embody these rights in its own legal system and to ensure their observance in practice.

• • •

"With all the resources at their (the churches') disposal they should oppose enforced segregation on grounds of race or color, working for the progressive recognition and application of this principle in every country."

Segregation, particularly in the matter of educational facilities, is in reality a survival, and in its operation a perpetuation, of the caste system. It is born of the concept of racial superiority and of class dominance which has brought incalculable misery to the human race through the ages. Self-preservation, to say nothing of the stability and sincerity of democratic institutions and of the obligations which men of good will profess, requires that this legacy find no shelter or perpetuation under the sanction of our Constitution and within the body of our law.

We shall not attempt in this brief now to discuss the various judicial decisions which are cited and analyzed in the various briefs submitted in connection with this petition. We recognize that the legalistic aspect of the issue is important and relevant; but we are convinced of the greater relevancy and force of the fundamental principles on which alone our Constitution rests and by which alone it can be sustained. We do not believe that in the human tempest which has been shaking the world for several

decades, our form of government and way of life can permanently endure on the basis of discriminations and segregations which constitute a contradiction of our principles by our actions. It is still true that this country cannot exist half slave and half free.

The convictions, legal, social, ethical and religious, which The Federal Council has set forth in Official Statement, and which it deems an essential part of the mission for which it exists find, we believe, sufficient and controlling expression in the field of constitutional law in the unanimous decision of this Court on May 3, 1948 in *Shelley* v. *Kraemer*, 334 U. S. 1, 23:

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."

These profound words constituted the heart and spirit of an historic constitutional decision which struck down enforced segregation, either by public act or private agreement, in the matter of a place to live physically. They apply with far more force and aptness in the matter of a place to live mentally and spiritually. The right to life, liberty and the pursuit of happiness, and the right to enjoy and exercise as an equal the inalienable rights with which every man is endowed by his Creator, is not and cannot be confined to physical existence. Man is not merely

body. He is also and chiefly mind and spirit; and "the life is more than meat, and the body is more than raiment."

Segregation in the matter of a place to live means the ghetto. Segregation in matters of the mind and spirit means second-class citizenship. Both betray a Constitution which, as said by Mr. Justice Murphy in *Oyama* v. *California*, 332 U. S. 633, 663, "embodies the highest political ideals of which man is capable," and "insists that our government, whether state or federal, shall respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin or the nature of his beliefs." Both betray the very foundations of our democratic way of life and hence also our effort to exert leadership in founding on that way of life a durable peace throughout the world. Both betray what Emil Brunner, in his recent treatise "*Justice and the Social Order*," so truly describes as the "sacred law, which can be appealed to against every inhuman, unjust social order, against any caprice or cruelty on the part of the state."

Hence, we earnestly join in the request that this petition for a writ of certiorari be granted, in order that the inherent issue so overshadowing our American life may be fully discussed, considered and decided in this great tribunal.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 44.

HEMAN MARION SWEATT, *Petitioner*,

v.

THEOPHILUS SHICKEL PAINTER ET AL.

On a Writ of Certiorari to the Supreme Court of the State of Texas.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

THOMAS I. EMERSON
JOHN P. FRANK
ALEXANDER H. FREY
ERWIN N. GRISWOLD
ROBERT HALE
HAROLD HAVIGHURST
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FOR THE COMMITTEE OF LAW TEACHERS AGAINST SEGREGATION IN LEGAL EDUCATION

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TREATISES AND ARTICLES:

Abrams, Race Bias in Housing (1947) 26
Abrams, The Segregation Threat in Housing, 7 Commentary 123 (1949) 26

Page

American Council on Education, Thus Be Their Destiny (1941) 31
American Council on Education, Color, Class and Personality (1942) 31
American Management Association, The Negro Worker (1942) 28
Article, UT Institutes Placement Service, 12 Texas Bar Journal 208 (1949) 43
Beard, The Rise of American Civilization (1935) 10
Bellson, Labor Gains on the Coast, 17 Opportunity 9 (1939) 29
Benedict, Transmitting Our Democratic Heritage in the Schools, 48 Am. Jour. Sociol. 722 (1943) 36, 37
Boutwell, Reminiscences of Sixty Years (1902) 10
Boyd, Some Phases of Educational History in the South Since 1865, Studies in So. Hist. 259 (1914) 13
Boyer, The Smaller Law Schools, 9 Am. Law School Rev. 1469 (1942) 42
Bowen, Divine White Right (1934) 31
Brubacher, Modern Philosophies of Education (1939) 37
Comment, 56 Yale L. J. 837 (1947) 28
Commission on Discrimination in Employment, New York State War Council, Breaking Down the Color Line, 32 Management Rev. 174 (1943) 28
Curry, Brief Sketch of George Peabody (1898) 17
Curti, The Social Ideas of American Educators (1935) 36, 37
Dewey, Democracy and Education (1916) 37
Flack, The Fourteenth Amendment (1908) 10
Fleming, Documentary History of Reconstruction (1906) 7, 12, 17
Frasier and Armentrout, An Introduction to Education (3d ed. 1933) 37
Gifford, The Placement of Law Students and Law Graduates, 9 Am. Law School Rev. 1063 (1941) 43
Gillmor, Can the Negro Hold His Job?, National Association for Advancement of Colored People Bull. (Sept. 1944) 28-9
Grosvenor, 24 New Englander 268 (1865) 7
Horne and Robinson, Adult Educational Programs in Housing Projects with Negro Tenants, 14 J. Negro Educ. 353 (1945) 26
Jackson, The Product of Our Present-Day Law Schools, 9 Am Law School Rev. 370 (1939) 41, 46
James, The Framing of the Fourteenth Amendment (1939) 7
Kallen, The Education of Free Men (1949) 37, 38
Key, Southern Politics (1949) 24
Kilpatrick (Ed.), The Educational Frontier (1933) 37
Knight, The Influence of Reconstruction on Education in the South (1913) 12
Lewin, Resolving Social Conflicts (1948) 37
MacIver, The More Perfect Union (1948) 32, 38
McPherson, Handbook of Politics for 1868 (1868) 7

Page

Manning and Phillips, Negroes as Neighbors, 13 Common Sense 134 (1944) 26
Mayo, The Human Problems of an Industrial Civilization (1933) 37
Merriam, The Making of Citizens (1931) 36
Miller, Thaddeus Stevens (1939) 10
Morrison and Commager, The Growth of the American Republic (1942) 10
Moylan, Selected List of Books for the Small Law School Library, 9 Am. Law School Rev. 469 (1939) 42
Murray (Ed.), The Negro Handbook (1949) 25
Myers and Williams, Education in a Democracy (1942) 36
Myrdal, An American Dilemma (1944) 31
Nason, Life of Henry Wilson (1876) 5
Newlon, Education for Democracy in Our Time (1939) 38
Newman, An Experiment in Industrial Democracy, 22 Opportunity 52 (1944) 28
Northrup, Proving Ground for Fair Employment, 4 Commentary 552 (1947) 28
Note, 49 Col. L. Rev. 629 (1949) 31
Note, 56 Yale L. J. 1059 (1947) 30, 31
Note, 58 Yale L. J. 472 (1949) 31
Ottley, The Good-Neighbor Policy—At Home, 2 Common Ground 51 (1942) 26
Patterson, The Legal Aid Clinic, 21 Tex. L. Rev. 423 (1943) 44
Pound, Social Control Through Law (1942) 46
Ross, They Did It in St. Louis, 4 Commentary 9 (1947) 29
Ross, Tolerance by Law, 195 Harper's Mag. 458 (1947) 28
Rostow, Liberal Education and the Law: Preparing Lawyers for Their Work in Our Society, 35 A. B. A. Jour. 626 (1949) 44-5
Simon, Causes and Cure of Discrimination, N. Y. Times, May 29, 1949, § 6, p. 10 28
Sumner, Works (1874) 6, 8
Sweetland, The CIO and Negro American, 20 Opportunity 292 (1942) 29
Taylor, Negro Teachers in White Colleges, 65 Sch'l and Society 369 (1947) 26
Warren, The Supreme Court in U. S. History (1926) 21
Westermann, Between Slavery and Freedom, 50 Am. Hist. Rev. 213 (1945) 4
Williams, The Louisiana Unification Movement in 1873, 2 J. So. Hist. 349 (1945) 12
Wirth, Segregation, 13 Encyc. Soc. Sci. 643 (1934) 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 44.

HEMAN MARION SWEATT, *Petitioner,*

v.

THEOPHILUS SHICKEL PAINTER ET AL.

On a Writ of Certiorari to the Supreme Court of the State of Texas.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

STATEMENT

This is a brief of amici curiae in support of petitioner on a writ of certiorari to review the judgment of the Texas Court of Civil Appeals (R. 465) affirming a judgment of the District Court of Travis County denying petitioner's request for a writ of mandamus (R. 438-41). Review was denied by the Texas Supreme Court (R. 466). Certiorari was granted by this Court on Nov. 7, 1949. The jurisdictional details are contained in petitioner's brief, and the procedural history of the case appears at R. 438-72.

This brief is filed, with the consent of the parties, on behalf of the Committee of Law Teachers Against Segregation in Legal

Education, an organization identified more fully in Appendix A to this brief.

The essential facts are as follows:

The courts below have denied petitioner's application for a writ of mandamus to compel the appropriate officials of the University of Texas to admit him to its law school in Austin, Texas. He is concededly in all respects qualified for admission to that school except for the disqualification of race, for Texas bars Negroes from this University (R. 425, 445). The courts below have rejected petitioner's contention that this exclusion and petitioner's consequent relegation to a state "colored law school" violate his rights under the Fourteenth Amendment.

At the time the record below was made, the colored school was located in Austin, Texas. It has since been moved to Houston (see R. 51-2; Bulletin of the Texas State University for Negroes, School of Law 5 (1949-50)). Petitioner contends that, for the decision of the issues on which he petitions, the location is immaterial except in one important respect: The use of the University of Texas (white) faculty members was contemplated while the school was in Austin (R. 454), but a separate faculty is to be recruited for Houston (R. 28-9; see Bulletin, *supra*, at p. 4).

The Texas law school (colored) was set up in response to the order of the district court at an earlier stage of this same litigation (R. 424-33), and it does not appear in the record that there have ever actually been any students in it (though doubtless there are some), either in Austin or in Houston. Sweatt was the first Negro to apply for admission to the Texas law school (white) (R. 451); and in any case Texas concedes that the colored school will have very few students (R. 77).

SUMMARY OF ARGUMENT

The basic position of this brief is that segregated legal education in the state institutions of Texas violates the equal protection clause of the Fourteenth Amendment. That position is approached by three different paths.

First, analysis of the origins of "equal protection" in American law shows that, in the form of "equality before the law," it was transferred to this country from the French by Charles Sumner as part of his attack on segregated education in Massachusetts a decade before the Civil War, and linked by him with the Declaration of Independence. Popularized by Sumner, it or like phrases became the slogan of the abolitionists, and it passed into the Constitution as an important part of the abolitionists' share of the Civil War victory. Congress, contemporaneously with the adoption of the Fourteenth Amendment, clearly understood that segregation was incompatible with equality, a judgment reflected by this Court in *Railroad Co.* v. *Brown*, 17 Wall. 445 (1873).

In *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), this Court abandoned the original conception of equal protection, adopting instead the legal fiction that segregation (in that case, in transportation) is not discriminatory. This was a product, in part at least, of a policy judgment that the judiciary was incapable of enforcing the Amendment as it was written, and that the underlying social evil must be left to the correction of time. The Court erred on both counts: the judiciary is not so powerless as it supposed, and the results of its abdication have been disastrous. The dissenting views of Mr. Justice Harlan in the *Plessy* case were correct, and should be adopted now.

Second, we challenge the applicability to education of the "separate but equal" refinement of the equal protection clause. While we grant the existence of troublesome dicta, there is neither a holding nor even carefully considered dicta by this Court declaring that segregation may be enforced in any phase of education. In *Plessy* v. *Ferguson* the Court did not say that segregation was valid in every context in which men could devise ways of separatting themselves by color. On the contrary, it made careful distinction between reasonable and unreasonable segregation. We contend that segregation in education is for this purpose unreasonable.

Third, even within the broadest application of *Plessy* v. *Ferguson*, petitioner is entitled to absolute equality in education.

For reasons set forth in detail in the body of the brief, it is impossible for petitioner to receive at the improvised colored law school a legal education equal to that offered at the well-known University of Texas law school (white). Nor, indeed, can segregated legal education ever afford equal facilities.

ARGUMENT

I.

THE EQUAL PROTECTION CLAUSE WAS INTENDED TO OUTLAW SEGREGATION.

The Court below held (a) that segregated legal education can meet the constitutional standard, and (b) that Texas (colored) in fact did so. We challenge at the outset the entire basis of any decision which assumes that segregation can meet the standard of the Constitution. The Negro for whom the first section of the Fourteenth Amendment was primarily adopted was largely read out of that Amendment by nineteenth century decisions.[1] The time has come to reconsider the frustration of so much of section one of the Amendment as relates to the equal protection of the laws.

Society in the past has known intermediate stages of bondage between the free and the slave. In antiquity, "between men of these extremes of status stood social classes which lived outside the boundary of slavery but not yet within the circle of those who might rightly be called free."[2] The Thirteenth Amendment took the Negroes out of the class of slaves. Section one of the

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[1]While decisions outside the area of segregation are not directly involved in this case, the leading segregation decision of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), can be understood only as part of a group of decisions in the latter part of the nineteenth century narrowly construing the capacity of the Fourteenth Amendment to protect Negro rights. Other decisions include the *Civil Rights Cases*, 109 U.S. 542 (1883), and *United States* v. *Harris*, 106 U.S. 629 (1883).

[2]Westermann, *Between Slavery and Freedom*, 50 Am. Hist. Rev. 213, 214 (1945).

Fourteenth Amendment was intended to insure that they not be dropped at some half-way house on the road to freedom. It sought to bring the ex-slaves within the circle of the truly free by obliterating legal distinctions based on race.

The evidence of intent to eliminate race distinctions in transportation and education, relationships which must be considered together in the history of equal protection, is particularly clear. Equal protection first entered American law in a controversy over segregated education.

1. The original meaning of equal protection is incompatible with segregated education.

It was one thing, and a very important one, to declare as a political abstraction that "all men are created equal," and quite another to attach concrete rights to this state of equality. The Declaration of Independence did the former. The latter was Charles Sumner's outstanding contribution to American law.

The great abstraction of the Declaration of Independence was the central rallying point for the anti-slavery movement. When slavery was the evil to be attacked, no more was needed. But as some of the New England States became progressively more committed to abolition, the focus of interest shifted from slavery itself to the status and rights of the free Negro. In the Massachusetts legislature in the 1840's, Henry Wilson, wealthy manufacturer, abolitionist, and later United States Senator and Vice President, led the fight against discrimination, with "equality" as his rallying cry.[3] One Wilson measure gave the right to recover damages to any person "unlawfully excluded" from the Massachusetts public schools.[4]

Boston thereupon established a segregated school for Negro children the legality of which was challenged in *Roberts* v. *City of Boston*, 5 Cush. (Mass.) 198 (1849). Counsel for Roberts

[3]For an account of Wilson's struggles against anti-miscegenation laws, against separate transportation for Negroes, and for Negro education, see Nason, *Life of Henry Wilson*, 48 et seq. (1876).

[4]Mass. Acts 1845, c. 214.

was Charles Sumner, scholar and lawyer, whose resultant oral argument was widely distributed among abolitionists as a pamphlet.[5] Sumner contended that separate schools violated the Massachusetts state constitutional provision that "All men are created free and equal."[6] He conceded that this phrase, like its counterpart in the Declaration of Independence, did not by itself amount to a legal formula which could decide concrete cases. Nonetheless it was a time-honored phrase for a time-honored idea and, in a broad historical argument, he traced the theory of equality from Herodotus, Seneca and Milton to Diderot and Rousseau, philosophers of eighteenth century France.

At this point Sumner made his major contribution to the theory of equality. He noted that the French Revolutionary Constitution of 1791 had passed beyond Diderot and Rousseau to a new phrase: "Men are born and continue free and equal *in their rights.*" Using a popular French phrase in English for the first time, Sumner referred to "egalité devant la loi," or *equality before the law.* The conception of equality before the law, or equality "in their rights," was a vast step forward, for this was the first occasion on which equality of rights had been made a legal consequence of "created equal."

Equality before the law, or equality of rights, Sumner insisted, was the basic meaning of the Massachusetts constitutional provision. Before it "all . . . distinctions disappear." Man, equal before the law, "is not poor, weak, humble, or black; nor is he Caucasian, Jew, Indian, or Ethiopian; nor is he French, German, English, or Irish; he is a MAN, the equal of all his fellow men."[7] Separate schools were unconstitutional because they made a distinction where there could be no distinction, at the point of race, and therefore separate schools violated the principle of equality before the law.

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[5]Among those active in distributing the pamphlet was Salmon P. Chase of Ohio. *Diary and Correspondence of Salmon P. Chase,* Chase to Sumner, Dec. 14, 1849, in 2 Ann. Rep. Am. Hist. Ass'n. 188 (1902).

[6]The following summary of argument is taken from the complete argument reprinted in 2 Sumner *Works* 327 et seq. (1874).

[7]*Ibid.*

The Massachusetts court, unpersuaded, rejected Sumner's argument, and was in turn reversed by the state legislature.[8] But the argument outlasted the case, and from it the phrase "equality before the law," or its briefer counterpart, "equal rights," became the measuring stick for all proposals concerning freedmen.

Prior to the Civil War, the controversy over equality for the freedmen was primarily a dispute within the States, but national emancipation brought the issue to Congress where Sumner kept "equality" in the forefront of Congressional attention.[9] Shortly before the first meeting of the 39th Congress in December, 1865, the new Black Codes in the Southern States had shocked the North into widespread recognition of the need to secure equality.[10] Sumner's popularization of his equality theory had been so successful that its echo returned from Radicals everywhere.[11] Representative Bingham of Ohio offered a proposed Fourteenth Amendment in which the key phrase was a guarantee to the people of "equal protection in their rights, life, liberty, and property."[12] Senator Morrill of Vermont, shortly to be a member of the Joint Committee on Reconstruction, sent a note to Sumner suggesting that the best "jural phrase" for an amendment would be a guarantee that citizens are "equal in their civil rights, immunities and privileges and equally entitled to protection in life,

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[8]Mass Acts 1855, c. 256.

[9]See, *e.g.*, his discussion in the Senate of the possible wisdom of including "equality" in the Thirteenth Amendment. Cong. Globe, 38th Cong., 1st Sess. 1482 (1864).

[10]Handy compilations of these Codes are McPherson, *Handbook of Politics for 1868*, 29-44 (1868); 1 Fleming, *Documentary History of Reconstruction* c. 4 (1906).

[11]"Equality before the law" was the general cry. A Pennsylvania State Equal Rights League signed its correspondence "Yours for justice and equality before the law." Letter to Stevens of Nov. 1, 1865, *Stevens Mss.* (1865), Lib. Cong. And see resolution of Providence, R. I., Union League Club, *ibid*, asking "our members in Congress" to secure "equal rights of all men before the law." "Absolute equality before the law" was demanded in Grosvenor, 24 New Englander 268 (1865). See also James, *The Framing of the Fourteenth Amendment* 29 et seq. (1939), an unpublished Ph.D. thesis in the library of the University of Illinois. On the relative amount of attention given the first, as compared to the other sections of the Amendment, see note 22 *infra*.

[12]Cong. Globe, 39th Cong., 1st Sess. 14 (1865).

liberty and property."[13] Sumner himself introduced a reconstruction plan, an important part of which included "equal protection and equal rights."[14]

The first relevant measure actually to be considered by Congress was the bill which became the Civil Rights Act of 1866. This bill was originally introduced by Senator Wilson of Massachusetts, the same Wilson who had been so active earlier in the equality struggles in that state,[15] and we may assume that the proposal represented the joint policies of Wilson and Sumner.[16] The Wilson proposal invalidated all laws "whereby or wherein any inequality of civil rights and immunities" existed because of "distinctions or differences of color, race or descent." This measure, as it passed the Senate, contained a clause forbidding any "distinction of color or race" in the enforcement of certain laws, and assured "full and equal benefit of all laws" relating to person and property. Senator Howard, a member of the Joint Committee on Reconstruction, said of the Act, "In respect to all civil rights, there is to be hereafter no distinction between the white race and the black race."[17]

The Civil Rights bill was enacted, but over the protest of one extreme radical in the House. Representative Bingham of Ohio opposed the measure on the ground that the Thirteenth Amendment gave it an inadequate base. He preferred to wait until

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[13]Morrill to Sumner, undated, prob. Oct. or Nov., 1865, in *Sumner Mss.*, quoted in James, *supra* note 11 at 31.

[14]10 Sumner, *Works* 22 (1874).

[15]Though the measure was introduced by Wilson, actual leadership on the proposal passed from him to Senator Trumbull of Illinois, chairman of the Judiciary Committee. The proposal originated with S.9 in the 39th Cong., introduced by Wilson, from which the text quotations are taken. A few days later, after floor discussion which revealed that Trumbull was willing to take the lead on the measure, Cong. Globe, 39th Cong., 1st Sess. 43 (1865), Wilson introduced a new bill, S. 55, which retained and enlarged the language of S. 9. This bill was referred to by Trumbull's name but retained Wilson's proposals. S. 61 became the Civil Rights Act of 1866. 14 Stat. 27 (1866).

[16]Wilson hinted as much. Cong. Globe, 39th Cong., 1st Sess. 39 (1865).

[17]*Id.* at 504.

a new Amendment might pass which would eliminate all "discrimination between citizens on account of race or color."[18] As a member of the Joint Committee on Reconstruction, Bingham was then working on just such an Amendment. With fellow Committee members such as those extreme equalitarians Stevens, Howard, and Morrill, there was no serious obstacle in Committee.

Bingham drafted for the Committee the essential language of section one of the Fourteenth Amendment. In the vital equality clause he combined the language of his own earlier proposed amendment, "equal protection in their rights" and the Civil Rights bill language, "equal benefit of all laws" into the concise "equal protection of the laws."[19] The prompt adoption of the Amendment carried the abolitionist theory of racial equality into our basic document.[20] As Senator Howard, floor leader for the Amendment in the Senate, said of the clause, it "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." The core of the clause he reduced to Sumner's meaning: "It establishes equality before the law . . . ."[21]

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[18] *Id.* at 1290, 1293.

[19] The greatest contribution of the Bingham draft of the clause was not in the words he used, but in those he omitted. Previous proposals had sometimes carried words of qualification as to the particular types of laws as to which equal protection was to be afforded. The Civil Rights bill in the Senate had referred to "equal benefits of all laws and proceedings for the security of person and estate," and had referred to "discrimination in civil rights and immunities." Bingham saw hopeless confusion in these refinements, see remarks cited, *supra* note 18, and omitted them. He thus brought the language squarely into accord with the broad "equality before the law."

[20] We do not, in tracing this history of the phrase "equal protection," overlook sporadic earlier uses of similar language. See, *e.g.*, Mass. Const. Art. III (1780); N. H. Const. Art. VI (1792); and Me. Const. Art. I, § 3 (1819). The context of those Articles, dealing with freedom of religion, are so alien to the subject at hand that they were never referred to in connection with the Fourteenth Amendment.

[21] Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). Some of the broad expressions contemporaneously used, as in the text above, must be read in the light of the fact that it was racial distinctions which were being discussed. Howard, for example, meant not that the Amendment obliterated all classifications in the law, but that it obliterated race as a basis of classification.

Because the primary concern of those who enacted the Fourteenth Amendment was with sections two and three of the Amendment, rather than section one which includes equal protection, we do not have complete evidence of the views of all the responsible men of the time on the meaning of equal protection.[22] We do know that the clause found its way into the Constitution through Sumner, through Wilson, through Trumbull and through the twelve majority members of the Joint Committee on Reconstruction. Of those fifteen at least eight—Sumner, Wilson, Bingham, Howard, Stevens, Conkling, Boutwell, and Morrill—thought the clause precluded any distinctions based on color.[23] Three—Trumbull, Fessenden, and Grimes—had some mental reservations, particularly as to miscegenation, although they agreed generally

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[22]Much of the murkiness in the history of "privileges and immunities," "person," and "due process," as well as equal protection, is produced by the fact that what has become the only significant part of the Amendment was then the least significant part. The Republican Party represented a coalescence of certain economic and political interests, along with the abolitionists. Standard references on the subject are 2 Beard, *The Rise of American Civilization* c. 23 (1935), and 2 Morrison and Commager, *The Growth of the American Republic* c. 1 (1942). The best telling of the manner in which these factions sought to solve their problems by the Fourteenth Amendment is Flack, *The Fourteenth Amendment* (1908). The short of it is that the politicians and the economic interests they represented got the middle sections of the Amendment, while section one was the abolitionists' share of the victory.

[23]The views of Sumner, Wilson, and Howard are apparent from various quotations throughout this brief. Stevens was, if anything, a more extreme equalitarian than the other two. See Miller, *Thaddeus Stevens* 9-43, 404, 405 (1939); and see Cong. Globe, 39th Cong., 1st Sess. 1063, 1064 (1866). The views of Conkling, Morrill, and Boutwell are apparent from their consistent support of the Sumner civil rights bill, discussed in detail, *infra*. The case as to Bingham is less clear, since his pre-occupation in the Amendment was largely with the privileges and immunities clause, his special contribution. Cf. 2 Boutwell, *Reminiscences of Sixty Years* 41 (1902). However, his view was apparently in accord with the others of this group, as evidenced at least by some phrases. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1293 (1866).

with the others.[24] The positions of the remainder we do not know, though some, at least, doubtless agreed with Sumner.[25] It was thus the dominant opinion of the Committee that the clause eliminated distinctions of color in civil rights.

2. Contemporary rejection of "separate but equal" in Congress, immediately before and after the Fourteenth Amendment, represents a judgment incompatible with segregated education.

Congress repeatedly considered "separate but equal" in the Reconstruction decade, particularly in connection with transportation. Railroad and street car companies in the District of Columbia early began to separate white and colored passengers, putting them in separate cars or in separate parts of the same car, with quick Congressional response. As early as 1863, Congress amended the charter of the Alexandria and Washington Railroad to provide that "No person shall be excluded from the cars on account of color."[26] When, in 1864, the Washington and Georgetown street car company attempted to handle its colored passengers by putting them in separate cars, Sumner denounced the practice in the Senate and set forth on a crusade to eliminate street car segregation in the District.[27] After a series of skirmishes, he finally carried to passage a law applicable to all District carriers that "no person shall be excluded from any car on account of color."[28]

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[24]Fessenden and Trumbull believed that the Civil Rights Act and the Amendment did not affect anti-miscegenation legislation. Cong. Globe, 39th Cong., 1st Sess. 505 (1866) (Fessenden); *id.* at 322 (Trumbull). In 1864 Grimes thought segregated transportation was equal. Cong. Globe, 38th Cong., 1st Sess. 3133 (1864), with Trumbull apparently contra on that issue, *id.* at 3132. Whether the views of Grimes changed is not known.

[25]These four members, Harris, Williams, Blow, and Washburne, were conventional radicals and Harris, Blow, and Washburne had very strong anti-slavery backgrounds. It is therefore highly probable that at least some of them shared the views of Sumner and Stevens, but we have no direct evidence.

[26]12 Stat. 805 (1863).

[27]Cong. Globe, 38th Cong., 1st Sess. 553, 817 (1864).

[28]13 Stat. 537 (1865).

The discussion of the street car bills, all shortly prior to the Fourteenth Amendment, canvassed the whole issue of segregation in transportation. Those who supported the measures did so on grounds of equality. Senator Wilson denounced the "Jim Crow car," declaring it to be "in defiance of decency."[29] Sumner persuaded his brethren to accept the Massachusetts view, saying that there "the rights of every colored person are placed on an equality with those of white persons. They have the same right with white persons to ride in every public conveyance in the commonwealth."[30] Thus when Congress in 1866 wrote equality into the Constitution, it did so against a background of repeated judgment that separate transportation was unequal.[31]

The history of equal protection and separate schools, though less clear, suggests a similar interpretation. The close of the War found public education almost non-existent in the South,[32] and Negro school status in the North ranged from total exclusion from schools to complete and unsegregated equality.[33] Four Southern Reconstruction constitutions provided for mixed schools, and the Northern educational aid societies offered unsegregated education in the South.[34] Although these efforts to achieve unsegregated education were of little practical effect, they indicate the intellectual atmosphere from which equal protection emerged. The abolitionists were absolutely confident that the races both could

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[29]Cong. Globe, 38th Cong., 1st Sess. 3132, 3133 (1864).

[30]*Id.* at 1158.

[31]This was clear even from the conservative viewpoint. See remarks of Senator Reverdy Johnson, *id.* at 1156.

[32]One of the many works on the subject is Knight, *The Influence of Reconstruction on Education in the South* (1913).

[33]An extensive account contemporary with Reconstruction, much broader in scope than the title indicates, is *Spec. Rep., Commissioner of Education on Condition and Improvement of Public Schools, Dist. Col.*, H.R. Exec. Doc. No. 315, 41st Cong., 2d Sess. (1870).

[34]Materials are collected in 2 Fleming, *supra* note 10 at 171-212. Even conservative Southerners, when they sought to give full compliance to the Fourteenth Amendment, conceded that equality required unsegregated education. See Williams, *The Louisiana Unification Movement in 1873*, 2 J. South. Hist. 349 (1945), describing the concession of mixed schools by a political group headed by Gen. P. T. Beauregard.

and *should*, under the principle of equality, mingle in the school rooms.[35]

The primary responsibility of Congress for education was in the District of Columbia, where a segregated system was a going operation prior to the end of the Civil War. Securing a place on the District of Columbia Committee, Sumner proceeded to attack discriminations in the District one at a time.[36] Since he chose first to eliminate restrictions on Negro office-holding and jury service, he did not reach the school question on his own agenda until 1870.[37] He then twice carried proposals through the Committee to eliminate the segregation,[38] and urged his proposal on the floor of the Senate on the grounds of equality: "Every child, white or black, has a right to be placed under precisely the same influences, with the same teachers, in the same school room, without any discrimination founded on color."[39]

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[35]The Amendment must be read in the light of this psychology of optimism. Immediately after the War the abolitionist societies undertook educational work in the South on a large scale, fully recorded in such of their journals as *The American Freeman* and the *Freeman's Journal*. The Constitution of the Freeman's and Union Commission provided that "No schools or supply depots shall be maintained from the benefits of which any person shall be excluded because of color." *The Am. Freeman* 18 (1866). Lyman Abbott, General Secretary of the Commission, published a statement explaining that the policy had been fully considered: "It is inherently right. To exclude a child from a free school, because he is either white or black, is inherently wrong: . . . [We must] lead public sentiment toward its final goal, equal justice and equal rights . . . . The adoption of the reverse principle would really lend our influence *against* the progress of liberty, equality, and fraternity, henceforth to be the motto of the republic." *Id.* at 6. The fact is that few whites attended these schools. Boyd, *Some Phases of Educational History in the South since 1865*, Studies in Southern History 259 (1914).

[36]Sumner expounded this seriatim policy in Cong. Globe, 40th Cong., 2nd Sess. 39 (1867).

[37]The jury and office law was twice pocket-vetoed by President Johnson, and Sumner, therefore, had to secure its passage three times before it became effective in President Grant's administration. 16 Stat. 3 (1869).

[38]S. 361, Cong. Globe, 41st Cong., 2nd Sess. 3273 (1870), and S. 1244, *id.* at 1053 et seq.

[39]*Id.* at 1055.

The most important new voice heard in the District of Columbia school debate on Sumner's proposal was that of Senator Matt Carpenter of Wisconsin, a leading constitutional lawyer of his time and prevailing counsel in *Ex parte Garland*, 4 Wall. 333 (1867), *Ex parte McCardle*, 7 Wall. 506 (1869), and the *Slaughter-House Cases*, 16 Wall. 36 (1873). Carpenter said:

> "Mr. President, we have said by our constitution, we have said by our statutes, we have said by our party platforms, we have said through the political press, we have said from every stump in the land, that from this time henceforth forever, where the American flag floats, there shall be no distinction of race or color or on account of previous condition of servitude, but that all men, without regard to these distinctions, shall be equal, undistinguished before the law. Now, Mr. President, that principle covers this whole case."[40]

Filibuster, not votes, stalled the District of Columbia school measure.[41] Sumner thereupon terminated his efforts to clear up discriminations one at a time and determined to make one supreme effort along the entire civil rights front. He put his whole energy behind a general Civil Rights bill, which forbade segregation throughout the Union, in the District of Columbia and outside it, in conveyances, theaters, inns, and schools.[42] The consideration by the Senate of this measure, which in modified form became the Civil Rights Act of 1875, represents an overwhelming contemporary judgment that "separate but equal" schools, wherever located, violate the equal protection clause.

In the debates on this new civil rights bill, the leading cases on which this Court relied in *Plessy* v. *Ferguson* were pressed upon the Senate and rejected as unsound. *Roberts* v. *City of*

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[40]Cong. Globe, 41st Cong., 3rd Sess. 1056 (1871).

[41]By 1872, the filibuster had come into frequent use in the defense against radical legislation. By a vote of 35 to 20 Sumner defeated those who sought to keep his District school measure off the floor entirely, Cong. Globe, 42nd Cong., 2d Sess. 3124 (1872), but his time was used up before he could bring the matter to final vote.

[42]The measure was proposed by Sumner both as a bill and as an amendment to other bills over a period of years. Its final presentation was in the 43rd Cong., S. 1.

Boston, supra, was quoted without avail.[43] A contemporary Ohio decision, *State* v. *McCann*, 21 Ohio St. 198 (1872), which held that separate schools were adequate, was rejected by name before these men who knew the Fourteenth Amendment best.[44] They made the point over and over again that the Amendment forbade *distinctions* because of race. As Senator Edmunds of Vermont, later chairman of the Senate Judiciary Committee, put it when he rejected separate schools: "This is a matter of inherent right, unless you adopt the slave doctrine that color and race are reasons for distinction among citizens."[45] Sumner himself denounced "separate but equal" in the Senate as he had denounced it in his oral argument in *Roberts* v. *City of Boston* years before:

> "Then comes the other excuse, which finds Equality in separation. Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the artificial substitutes for Equality; and this is the contrivance by which a transcendent right, involving a transcendent duty, is evaded.
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> . . . Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instinct with the spirit of slavery, and this decides its character. *It is Slavery in its last appearance.*"[46]

The bill started its final road to passage in the 43rd Congress. As Sumner had died, Senator Frelinghuysen of New Jersey led the debate for the bill, beginning on April 29, 1874, with an extensive argument that segregation was incompatible with the Fourteenth Amendment. The bill, he said, sought "freedom from all discrimination before the law on account of race, as one of the

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[43]Cong. Globe, 42nd Cong., 2d Sess. 3261 (1872).

[44]Senator Ferry, opposing the bill, relied on the *McCann* case. *Id.* at 3257. At the time of its final consideration, Senator Frelinghuysen, in charge of the bill in the Senate, explained why he thought the *McCann* case should not control. 2 Cong. Rec. 3452, 43rd Cong., 1st Sess. (1874).

[45]Cong. Globe, 42nd Cong., 2d Sess. 3260 (1872).

[46]Cong. Globe, 42nd Cong., 2d Sess. 382, 383 (1871) (emphasis added).

fundamental rights of United States citizenship."[47] For this he found full warrant in the equal protection clause. Segregation in the schools, he said, could only be voluntary, for "the object of the bill is to destroy, not to recognize, the distinctions of race."[48]

There were in the Senate three distinct views on the problem of segregated schools. A minority thought that "separate but equal" schools should be permitted. On May 22, 1874, an amendment to that effect offered by Senator Sargent of California was rejected, 26 to 21. Those 26 included Morrill, Conkling and Boutwell, who had been on the Committee which had drafted the Amendment. By voting to reject the "separate but equal" school clause, they necessarily indicated a judgment that Congress had power to legislate against segregated schools under the equal protection clause. This contemporary affirmative and deliberate interpretation of the Constitution is entitled to great weight here. *McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892).

The 26 were not themselves of one mind. Senator Boutwell represented a small minority view that separate schools necessarily bred intolerance and therefore should not be allowed to exist even if both races desired it.[49] However, the dominant Senate opinion was that separate schools should be forbidden by law, as the Amendment and this bill forbade them; but that if the entire population were content in particular instances to accept separate schools, it might do so. Senator Pratt of Indiana, one of the most vigorous supporters of the bill, noted that Congress was continuing separate schools in the District of Columbia because both races were content with them; and at the same time he pointed out that where there were very few colored students, they would have to be intermingled.[50] Senator Howe put it most concretely when he observed that if, by law, schools were permitted to be

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[47] 2 Cong. Rec. 3452, 43rd Cong., 1st Sess. (1874).

[48] *Ibid.*

[49] "If it were possible, as in the large cities it is possible, to establish separate schools for black children and for white children, it is in the highest degree inexpedient to either establish or tolerate such schools." From speech of Senator Boutwell, *id.* at 4116.

[50] *Id.* at 4081, 4082.

separate, they would never in fact be equal. He believed in prohibiting separate schools and then letting people do as they chose: "Let the individuals and not the superintendent of schools judge of the comparative merits of the schools."[51]

The bill passed the Senate, but in the House the result was different. The bill passed, but with the school clause deleted.

This deletion was the product of many factors. The House had previously voted to require mixed schools,[52] but on this occasion it was confronted with the firm opposition of the George Peabody Fund. Peabody, an American merchant who founded what became J. P. Morgan & Co., established a fund of $3,000,000 to aid education in the South. As abolitionist education aid societies ran out of money and collapsed, the Peabody Fund became the only major outside agency aiding Southern education. The Fund opposed mixed schools, withdrawing its aid where they were required.[53] It claimed credit for inducing President Grant to instruct his House floor leader to abandon the school provision.[54] Coupled with this pressure were threats from Southern representatives that they would end their newly founded public school systems if the Senate measure passed.[55] In addition, some Representatives felt that the courts would protect the Negroes on the school issue, and thus as a matter of legislative discretion waived the right to legislative aid.[56] For whatever combination

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[51] *Id.* at 4151.

[52] H.R. 1647, Cong. Globe, 42nd Cong., 2d. Sess. 2074 (1872), (House refused, 73 to 99, to lay bill on table); *id.* at 2270, 2271 (engrossed and read three times, 100 to 78); no final action taken.

[53] 2 Fleming, *supra* note 10 at 194. During this period the Fund was under the direction of Dr. Barnas Sears, later succeeded by J. L. Curry. Curry, in a volume on the work of the Fund, introduces the topic of mixed schools with the words, "Some persons, not to 'the manner born', took the lead in organizing a crusade for the co-education of the races." Curry, *Brief Sketch of George Peabody* 60 (1898).

[54] *Id.* at 64, 65.

[55] See, *e.g.*, discussion of this point by Representative Roberts, who stated that he preferred to prohibit segregated schools but would vote to omit the clause for fear the South would abolish all schools. 3 Cong. Rec. 981, 43rd Cong., 2d Sess. (1875).

[56] See remarks of Representative Monroe, *id.* at 997, 998.

of reasons, a leading Negro Representative from South Carolina consented to eliminate the school clause in return for assurance that the rest of the bill would pass.[57] The House result, clearly, thus represented a political rather than a constitutional judgment.

In summary, equal protection as a legal conception originated before the Civil War in Sumner's attack on segregated schools. It became the abolitionist rallying cry and was brought into the Constitution by the abolitionist wing of the Republican Party. Before the Fourteenth Amendment was adopted, "equal rights" was thoroughly understood to mean identical, and not separate rights, particularly in transportation. That was the view of the dominant group among those who actually phrased the Fourteenth Amendment. Throughout the debate on the Amendment its supporters acknowledged no doctrine of equal but separate as an exception to the fundamental concept of equal rights. Contemporary legislative action confirms this basic position.

3. In Railroad Co. v. Brown, this Court early decided that "separate" could not be "equal".

In the leading case of *Railroad Co.* v. *Brown*, 17 Wall. 445 (1873), this Court early decided that separate accommodations, no matter how identical they might otherwise be, were not equal.

On February 8, 1868, Catherine Brown, colored, attempted to board a railroad car on a line from Alexandria to Washington. That road had a "Sumner amendment" in its charter which provided that "no person shall be excluded from the cars on account of color."[58] The railroad maintained two identical cars, one next to the other on the train, using one for white and the other for colored passengers. When Mrs. Brown attempted to sit in the "white" car, she was ejected with great violence.

The pertinent legal issue in Mrs. Brown's case was whether segregation amounted to the same thing as "exclusion from the cars." The episode attracted immediate attention because Mrs.

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[57] See remarks *id.* at 981, 982.

[58] 12 Stat. 805 (1863).

Brown was in charge of the ladies' rest room at the Senate. A Senate investigating committee concluded that the Company had violated its charter, and recommended that the charter be repealed if Mrs. Brown were not fully compensated by civil damages.[59]

At the trial, the Company unsuccessfully asked for a charge to the jury that separate but equal cars complied with the statute, and in the Supreme Court it argued that "making and enforcing the separation of races in its cars" was "reasonable and legal."[60]

The Supreme Court unanimously rejected the "separate but equal" argument as "an ingenious attempt to evade a compliance with the obvious meaning of the requirement."[61] The object of the Sumner amendment, said the Court, was not merely to let the Negroes buy transportation, but to let them do so without "discrimination":

> "Congress, in the belief that this discrimination was unjust, acted. It told the company, in substance, that it could extend its road into the District as desired, but that this discrimination must cease, *and the colored and white race, in the use of the cars, be placed on an equality.* This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it."[62]

Thus in its first review of "separate but equal," this Court held that segregation was "discrimination" and not "equality." We ask the Court to apply that same principle in the instant case.

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[59]Sen. Rep. No. 131, 40th Cong., 2d Sess. (1868).

[60]The quotation is taken from the brief on file in the Supreme Court library.

[61]17 Wall. 445, 452. The same approach as that of the Brown case is taken whenever a statute which requires "equal" treatment is held to forbid segregation. See, *e.g., Baylies* v. *Curry,* 128 Ill. 287, 21 N.E. 595 (1889) (restricting Negroes to particular theater seats held violation of statute); *Jones* v. *Kehrlein,* 47 Cal. App. 646, 194 P. 55 (1920) (same).

[62]17 Wall. 445 at 452, 453 (emphasis added).

4. Plessy v. Ferguson, which undid the Brown case and the legislative history of equal protection, should be overruled.

Twenty years after *Railroad Co.* v. *Brown,* this Court took a wholly different view of segregation.

The exact issue in *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), was whether a Louisiana requirement of separate railroad accommodations denied equal protection. Mr. Justice Brown for the majority held that this segregation did not stamp "the colored race with a badge of inferiority." If it did so, said he, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[63]

Mr. Justice Harlan, dissenting, states our case:

> "It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons . . . .
>
> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached

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[63] *Plessy* v. *Ferguson,* 163 U.S. 537, 551 (1896).

the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

"In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by the tribunal in the *Dred Scott* case." (163 U.S. at 556-9).

The core of Mr. Justice Brown's argument is in his assumption that segregation is not a white judgment of colored inferiority. This would be so palpably preposterous as a statement of fact that we must assume Justice Brown intended it as a legal fiction. The device of holding a despised people separate, whether by confinement of the Jew to the ghetto, by exclusion of the lowest castes in India from the temples, or by the slightly more refined separate schoolroom, is clearly expression of a judgment of inferiority.

The real question, therefore, is why should the Court have adopted this legal fiction? Why should the Court have thought it necessary to make a pretense that segregation is anything other than discrimination?

The Court chose to overthrow the Fourteenth Amendment, not for caprice, but for reasons of policy.[64] The specific policy judgments made by the Court are analyzed in the next section of this brief. Suffice it to point out here that *Plessy* v. *Ferguson* was part of the process by which the Court in the latter part of the nineteenth century failed to preserve for the Negro many of the major gains of abolition.

We submit that the Court should return to the original meaning of the Fourteenth Amendment. We grant, as *Plessy* implies, that termination of segregation is a break with tradition. But we contend that there is nothing in the tradition of Negro slavery

[64]For discussion of the policy bases of the reconstruction decisions, see 2 Warren, *The Supreme Court in United States History* 608 (1926). He lists three factors: the desire to eliminate "the Negro question" from national politics; the desire to relegate the Negroes to state authority; and the desire to restore confidence in the Court in the South. Our central position is that the Amendment should not have been sacrificed for any or all of these considerations.

that is worth preserving. The Thirteenth, Fourteenth and Fifteenth Amendments committed the country to the great experiment of making a complete break with that tradition. When Charles Sumner gave the abolitionists the formula of equality before the law, he did not mean equality with reservations, equality with segregation. Decisions such as *Plessy* v. *Ferguson* turn the Fourteenth Amendment into a phantom or a grotesque mistake. As Senator Frelinghuysen said in presenting the anti-segregation Civil Rights Bill of 1875 to the Senate:

> "If, sir, we have not the Constitutional right thus to legislate, then the people of this country have perpetrated a blunder amounting to a grim burlesque over which the world might laugh were it not that it is a blunder over which humanity would have occasion to mourn. Sir, we have the right, in the language of the Constitution, to give 'to all persons within the jurisdiction of the United States the equal protection of the laws'."[65]

This Court should return to the original purpose of the equal protection clause, to forbid distinctions because of race. State-enforced segregation is unconstitutional because it makes such a distinction. As Senator Edmunds put it, it is "slave doctrine" to make color and race reasons for distinctions among citizens. Segregation *is* discrimination. *Railroad Co.* v. *Brown, supra.*

II.

THE BASIC POLICIES UNDERLYING THE COURT'S APPROVAL OF SEGREGATION IN PLESSY V. FERGUSON HAVE, IN THE YEARS INTERVENING SINCE THAT DECISION, PROVED TO BE NOT ONLY WHOLLY ERRONEOUS BUT SERIOUSLY DESTRUCTIVE OF THE DEMOCRATIC PROCESS IN THE UNITED STATES.

If the meaning of equal protection, whether considered in terms of historic intent or of the ordinary meaning of words, is clearly incompatible with segregation, as we say it is, then the further task confronts us of assessing the underlying bases of *Plessy* v.

[65] 2 Cong. Rec. 3451, 43rd Cong., 1st Sess. (1874).

Ferguson. Concededly "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). This Court must deal with the same practical consideration that faced the Court in the nineteenth century. Petitioner, if he would persuade you to reconsider *Plessy*, must persuade you that Harlan's dissent had more than a theoretical validity.

Two fundamental judgments of fact and policy underlay the decision of the majority in *Plessy* v. *Ferguson*. One was the Court's acceptance of the premise that, since "[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences," it is impossible to eliminate segregation founded in the "usages, customs and traditions" of the community, and hence the Constitution must bow to the inevitable. The other was the Court's assumption that the wiser policy was to let events take their course and that governmental intervention "can only result in accentuating the difficulties of the present situation." 163 U.S. at 550-2.

Over half a century has passed since the Court decided *Plessy* v. *Ferguson*. In these years much that was obscure about the practice of segregation has become clarified. As events have unfolded, as trends have become more distinct, as additional knowledge has been gained, the impact of segregation upon American life has emerged more clearly. In the light of these intervening developments, the basic judgments made by the Court in *Plessy* v. *Ferguson* have proved to be erroneous. Indeed, far from solving or even alleviating the problem of racial segregation the decision of the Court has tended to intensify it and to create conditions that threaten to undermine the very structure of American democratic society.

1. The judgment of the Court in Plessy v. Ferguson that direct governmental intervention to eliminate segregation is ineffective to overcome the prevailing customs of the community has proved to be without foundation.

There are severe limitations, of course, upon the effectiveness of direct legal compulsion to wipe out the gap that exists between

American theory and certain American practices in race relations. But the fact is that the ideal of racial equality is a deeprooted moral and political conviction of the American people. Decisions of this Court upholding that conviction, therefore, cannot fail to have a profound and far reaching effect upon the constant struggle being waged between ideal and practice. And, conversely, a decision that fails to give support to that conviction must necessarily have important depressing and retarding consequences.

Experience has shown that this Court is not as impotent in the field of race relations as the majority in *Plessy* v. *Ferguson* assumed. On the contrary every decision of this Court against racial discrimination has made a significant contribution toward the achievement of racial equality.

Concrete evidence is available, for instance, that the decisions of this Court in the white primary cases have not only eliminated the institution of white primaries but have resulted in a substantial increase in Negro voting. V. O. Key, in his careful study entitled *Southern Politics*, reports that except in four states of the Deep South the decision in *Smith* v. *Allwright*, 321 U.S. 649 (1944), was accepted "more or less as a matter of course."[66] Pointing out that the effect of the decision was not felt until the 1946 primaries, he notes that "Florida experienced a sharp increase in Negro registration after 1944"; that "[i]n 1946 the voting status of Georgia Negroes changed radically," the number of Negro registrants rising to an estimated 110,000; and that in Texas, "with a few scattered local exceptions, Negroes voted without hindrance in the 1946 Democratic primaries."[67] Key reports that four states—South Carolina, Alabama, Mississippi and Georgia—made strenuous efforts to avoid the effect of the *Allwright* case, but that these efforts were quickly nullified by the courts in both South Carolina and Alabama. With respect to South Carolina he observes:

> "Negroes have encountered stubborn opposition to even a gradual admission to Democratic primaries in South Caro-

[66] Key, *Southern Politics* 625 (1949).
[67] *Id.* at 625, 519-521.

lina. The last vestige of the white primary was stricken down by court action in that state in 1948. Prior to that time virtually no Negroes voted in the primaries. About 35,000 are reported to have cast ballots in the 1948 primary."[68]

Thus it is clear that judicial decisions have been a powerful influence in assisting the Negro to obtain the right of franchise. The decision of this Court in *Morgan* v. *Virginia*, 328 U.S. 373 (1946), has made an important contribution to racial equality in the field of transportation.[69] And evidence was offered in the instant case showing that where segregation in the University of Maryland Law School was ended by judicial compulsion the subsequent experience was wholly satisfactory.[70]

That the majority in *Plessy* v. *Ferguson* greatly over-estimated the practical difficulties of eliminating segregation through governmental action is likewise apparent from the accumulation of evidence in recent years that discriminatory practices, long rooted in the "usages, customs and traditions" of the community, can be successfully eradicated. The President's Committee on Civil Rights, in one of the most significant findings of its well-documented report, concludes:

> "If reason and history were not enough to substantiate the argument against segregation; recent experiences further strengthen it. For these experiences demonstrate that segregation is an obstacle to establishing harmonious relationships among groups. They prove that where the artificial barriers that divide people and groups from one another are broken, tension and conflict begin to be replaced by cooperative effort and an environment in which civil rights can thrive."[71]

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[68] *Id.* at 522. For a full account of Negro voting and the white primary litigation, see *id.* at 517-22, 619-43. See also Murray (Ed.), *The Negro Handbook* 48-53 (1949). It has been estimated that the number of Negroes registered to vote in the South increased from 211,000 in 1940 to over 1,000,000 in 1948. *Id.* at 53.

[69] See, *e.g.*, *id.* at 64.

[70] R. 290. This evidence was excluded by the trial court.

[71] Report of President's Committee on Civil Rights, *To Secure These Rights* 82-3 (1947).

Specifically in the field of education I. E. Taylor, after noting the increase of Negro teachers in white colleges, observes:

> "Reports are coming in that Negro scholars are giving a good account of themselves, that their students are enthusiastic and open-minded, and that alumni and parents are taking the situation calmly."[72]

The elimination of segregation in public housing raises issues perhaps more difficult than those involved in its elimination from higher education. Yet Charles Abrams, one of the country's foremost authorities on housing, writes:

> "Where Negroes are integrated with whites into self-contained communities without segregation, reach daily contact with their co-tenants, are given the same privileges and share the same responsibilities, initial latent tensions tend to subside, differences become reconciled, cooperation ensues and an environment is created in which interracial harmony will be effected.
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> "This conclusion is supported by many reports of housing authorities who have ventured into mixed occupancy."[73]

Experience with the abandonment of segregation in the armed services, again closely comparable with the situation in higher education, has been similar. The report of the President's Committee on Civil Rights cites an illustration involving Negro and white soldiers during the war:

> "The Negro soldiers were trained and organized into platoons, which were placed in regiments in eleven white combat divisions. For months the Negro and white men in these

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[72]Taylor, *Negro Teachers in White Colleges*, 65 School and Society 369 (1947).

[73]Abrams, *Race Bias in Housing* 22 (1947), pamphlet published jointly by American Civil Liberties Union, National Association for the Advancement of Colored People, and American Council on Race Relations. For other accounts of the successful elimination of segregation in housing see Ottley, *The Good-Neighbor Policy—At Home*, Common Ground, Summer 1942, p. 51; Manning and Phillips, *Negroes as Neighbors*, 13 Common Sense 134 (1944); Horne and Robinson, *Adult Educational Programs in Housing Projects with Negro Tenants*, 14 Jour. Negro Educ. 353 (1945); Abrams, *The Segregation Threat in Housing*, 7 Commentary 123 (1949); Report of President's Committee on Civil Rights, *To Secure These Rights* 85-7 (1947).

divisions worked and fought side by side. Then, white officers, noncommissioned officers, and enlisted men in seven of the eleven divisions were interviewed. At least two of these divisions were composed of men who were predominantly southern in background. It is surprising how little the response of these southern men varied from that of men from other parts of the country.

"Two out of every three white men admitted that at first they had been unfavorable to the idea of serving alongside colored platoons. Three out of every four said that their feelings toward the Negro soldiers had changed after serving with them in combat."[74]

Following up the recommendations of his Committee, President Truman in July, 1948, issued an Executive Order stating:

"It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale."[75]

Experience with governmental efforts to eliminate segregation in employment points consistently to the same conclusion. The Fair Employment Practice Committee, established during the war to promote equality of all races in employment, summarizes its experience of five years in its final report:

"Two fundamentally hopeful facts developed out of the Government's efforts to open war time opportunities to all workers:

"1. Employees and workers abandoned discrimination in most cases where Government intervened.

"2. Once the barriers were down, the workers of varying races and religions worked together efficiently and learned to accept each other without rancor."[76]

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[74] *Id.* at 83. With respect to the experience of the Merchant Marine the Report states: "Where there was contact with Negroes on an equal footing in a situation of mutual dependence and common effort prejudice declined." *Id.* at 85.

[75] Exec. Order 9981, Fed. Reg. 4313 (1948).

[76] U. S. Fair Employment Practice Committee, Final Report viii (1946). For discussion of FEPC experience in the South see *id.* at 33-6.

The history of state fair employment statutes shows the same results. Says a member of the New York State Commission Against Discrimination:

> "Critics of fair-employment laws used to claim that long-established habits of discrimination could not be changed by legislation. Their argument has been unmistakably answered today. Nearly four years experience in New York—and similar experience in New Jersey, Massachusetts, Connecticut, Washington, Oregon, New Mexico and Rhode Island, all of which have passed anti-discrimination legislation modeled after the New York law—indicates conclusively that wise legislation creates a climate of opinion in which discrimination tends to disappear."[77]

Where private management has seriously undertaken to eliminate discrimination in employment it has been successful. The American Management Association reports:

> "In the face of many objections to the use of Negro labor, there are the incontrovertible evidences of companies, large and small, which *are* hiring qualified Negroes for operations requiring varying levels of skill—and doing so with marked success . . . .
>
> "Many of the plants now making use of colored personnel have no previous history of Negro employment . . . . These plants are scattered all over the country . . . .
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> "It is evident that, irrespective of a company's past history or its geographical location, Negro workers can be introduced into a plant, or their employment extended, provided management is sincerely desirous of taking this course."[78]

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[77]Simon, *Causes and Cure of Discrimination*, N. Y. Times, May 29, 1949, § 6, p. 10 at p. 35. Cf. Ross, *Tolerance by Law*, 195 Harper's Mag. 458 (1947): "Two years of state FEPC's have done more to end job discrimination than fifty years of private agitation, good-will conferences and educational campaigning." See also N. Y. State Commission Against Discrimination, *1948 Report of Progress* 11-12; Comment, 56 Yale L. J. 837 (1947); Northrup, *Proving Ground for Fair Employment*, 4 Commentary 552 (1947).

[78]American Management Association, *The Negro Worker* 9-11 (1942). Among many other accounts of successful integration of Negro and white workers see Commission on Discrimination in Employment, N. Y. State War Council, *Breaking Down the Color Line*, 32 Management Review 174 (1943); Newman, *An Experiment in Industrial Democracy*, 22 Opportunity 52 (1944); Gillmor

Thus our present day experience demonstrates that elimination of patterns of segregation is not only feasible but is rapidly going forward under government sponsorship. As the American Civil Liberties Union has pointed out in its most recent survey of the status of civil liberties in the United States, "race equality under law advances steadily."[79] And again, "[t]he gathering momentum of the many-sided movements to extend the rights of Negroes was expressed in numerous court cases, legislation, administrative rules, and liberalized policies in quasi-public organizations."[80] The assumption of the majority in *Plessy* v. *Ferguson* that strict enforcement of the Fourteenth Amendment in accordance with its original purposes could not be made effective by governmental action has simply not been borne out by the actual developments. It is in this new atmosphere of progress that this Court should now reconsider the issues raised by the instant case.

2. Patterns of segregation have not tended to produce harmonious relations between races, as the Court assumed in Plessy v. Ferguson, but have increased tensions and become progressively destructive of the democratic process in the United States.

It was the judgment of the majority in *Plessy* v. *Ferguson* that the institution of segregation was better left alone, that judicial intervention under the Fourteenth Amendment would accentuate the difficulties. Clearly implied was the notion that harmonious relations would gradually evolve by a process of mutual adjustment.

(president of Sperry Gyroscope Co.); *Can the Negro Hold His Job?*, National Association for the Advancement of Colored People Bulletin 3-4 (Sept. 1944); Ross, *They Did It In St. Louis*, 4 Commentary 9 (1947). With regard to the successful integration of Negro and white workers in labor unions see Bellson, *Labor Gains On the Coast*, 17 Opportunity 142 (1939); Sweetland, *The CIO and Negro American*, 20 Opportunity 292 (1942).

[79] American Civil Liberties Union, 29th Ann. Rep. *In the Shadow of Fear* 3 (1949).

[80] *Id.* at 29.

Mr. Justice Harlan, with remarkable insight, understood that the majority's hope could not be realized:

> "The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution . . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?" (163 U.S. at 560).

Events have proved that Justice Harlan was right and the majority of the Court wrong.

The effects of segregation upon the group segregated have recently been summarized:

> "Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience . . . . Experience with segregation of Negroes has shown that adjustments may take the form of acceptance, avoidance, direct hostility and aggression, and indirect or deflected hostility. In seeking self-expression and finding it blocked by the practices of a society accepting segregation, the child may express hatred or rage which in turn may result in a distortion of normal social behavior by the creation of the defense mechanism of secrecy. The effects of a dual school system force a sense of limitations upon the child, and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy, and discourage racial self-appreciation."[81]

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[81] Note, 56 Yale L. J. 1059, 1061-2 (1947), citing numerous scientific authorities in support of the statement.

The consequences of segregation to the group that maintains the segregation have been described by Myrdal:

> "Segregation and discrimination have had material and moral effects on whites, too. Booker T. Washington's famous remark, that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white Southern and Northern observers."[82]

The psychological and sociological data showing the effects of segregation upon both groups and the serious tensions it creates in the community at large have been presented to the Court in the Brief for the United States in *Henderson* v. *United States* (No. 25, October Term, 1949) as well as by petitioner in this case.[83] There is no need to review these materials here. The point we wish to emphasize is that a satisfactory adjustment between the races has not been achieved through governmental inaction toward segregation. On the contrary, the continued existence of segregation has perpetuated and strengthened the grave maladjustments inherent in the system.

Myrdal, one of the most discerning students of the problem, has pointed this out, noting that what was merely segregation forty years ago is becoming a caste system today:

> "The spiritual effects of segregation are accumulating with each new generation, continuously estranging the two groups."[84]

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[82] 1 Myrdal, *An American Dilemma* 643-4 (1944).

[83] The material is relevant as showing both that segregation necessarily implies the inferiority of the segregated group and that separate facilities can in fact never be equal. In addition to the two briefs referred to, see the studies cited in Note, 56 Yale L. J. 1059 (1947) and Note, 49 Col. L. Rev. 629 (1949). See also Wirth, *Segregation*, 13 Encyc. Soc. Sci. 643 (1934); American Council on Education, *Thus Be Their Destiny* (1941); American Council on Education, *Color, Class and Personality* (1942); Bowen, *Divine White Right* (1934); Note, 58 Yale L. J. 472 (1949).

[84] 1 Myrdal, *An American Dilemma* 645 (1944). See also *id.* at 644-50.

The process has recently been described by MacIver:

> "Now let us consider more clearly the manner in which the conditions that are confirmed or imposed by discrimination operate to sustain it. The discriminating group starts with an advantage. It has greater power, socially and politically, and usually it has a superior economic position. Thus it is enabled to discriminate. By discriminating it cuts the other group off from economic and social opportunities. The subordination of the lower group gives the upper group a new consciousness of its superiority. This psychological reinforcement of discrimination is in turn ratified by the factual evidences of inferiority that accompany the lack of opportunity, by the mean and miserable state of those who live and breed in poverty, who suffer constant frustration, who have no incentive to improve their lot, and who feel themselves to be outcasts of society. Thus discrimination evokes both attitudes and modes of life favorable to its perpetuation, not only in the upper group, but to a considerable extent, in the lower group as well. A total *upper caste complex*, congenial to discrimination, a complex of attitudes, interests, modes of living, and habits of power is developed and institutionalized, having as its counterpart a *lower caste complex* of modes of living, habits of subservience, and corresponding attitudes."[85]

Thus the problems created by segregation are not solved by themselves or by the natural processes of the community upon which it has fastened its hold. Quite the contrary, segregation tends to feed upon itself and grow increasingly malignant. It is truly a cancer in our society, progressively threatening the health and very life of democracy. The real nature of segregation was not grasped by the majority in *Plessy* v. *Ferguson*.

3. This Court has ultimate responsibility, under the Constitution, to review the factual and policy judgment of the Texas legislature in this situation.

The Texas Court of Civil Appeals held that it could not reconsider the legal merits of segregation as that topic was "outside the judicial function. The people of Texas, through their consti-

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[85] MacIver, *The More Perfect Union* 67-8 (1948).

tutional and legislative enactments, have determined that policy, the factual bases of which are not subjects of judicial review." R. 450.

This is wrong. Texas cannot turn into a matter of fact or of local judgment the expressed principle of the federal Constitution that the rights of citizens of the United States are not dependent upon race, creed, or color. No subject is more fit for judicial review, and strict judicial review, than conduct which strikes at the heart of the democratic process. Mr. Justice Stone, in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 (1938), suggests that close scrutiny is necessary in "the review of statutes directed at particular religious . . . or national . . . or racial minorities"; for the "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry." And see *West Virginia State Bd.* v. *Barnett*, 319 U.S. 624, 638 (1943).

The institution of segregation is designed to maintain the Negro race in a position of inferiority. It drastically retards his educational, economic and political development and prevents him from exercising his rightful powers as a citizen. It creates maladjustments and tensions which sap the vitality of our society. Moreover, left to itself, it operates to strengthen and accentuate the very evils which need to be combatted. To this extent it is not subject to correction by the normal methods of the political process. On the other hand, judicial action to wipe out segregation has proved entirely practical and effective. In the light of these circumstances, not known to or recognized by the majority in *Plessy* v. *Ferguson*, the Court should not hesitate to strike down the practice as plainly violative of the Fourteenth Amendment's guarantee of equal protection.

III.

SEGREGATION SHOULD NOT BE EXTENDED TO EDUCATION.

1. The precedents do not uphold segregated education.

Plessy v. *Ferguson* involved segregation on common carriers and carefully did not endorse segregation generally. It was urged in argument that if segregation on carriers were valid, states might require white and colored persons to use different sides of the street, or paint their house or business signs different colors, on the ground that one side of the street or one color was as good as another. Such action, the Court said, would be invalid, holding that even segregation must be "reasonable." 163 U.S. at 550.

Though this Court has held that segregation of whites and Negroes in different blocks in a city is unreasonable, *Buchanan* v. *Warley*, 245 U.S. 60 (1917), it has never squarely faced the question whether segregation in education is unreasonable. If segregation laws are to be permitted in the casual affairs of life, such as riding on street-cars, but are to be invalidated when applied to such fundamental matters as establishing a home, the question becomes whether the undisputed right to equal education falls within the first category or the second.

This is not to say that the problem of the validity of segregation in education has never been referred to in the opinions of this Court, but rather that it has never been seriously argued or deliberately considered. In *Berea College* v. *Kentucky*, 211 U.S. 45 (1908), the issue was the validity of a Kentucky statute forbidding the teaching of Negroes and whites in the same college. The sole question raised and decided was that such a statute was not a violation of due process as an interference with the property rights of the educational corporation. The question of the rights of individuals was carefully put aside (*id.* at 54) and the equal protection problem was not involved. In *Cumming* v. *Richmond County Bd.*, 175 U.S. 528, 543 (1899), the Court in so many words excluded the legality of segregation in education from its decision. Yet in *Gong Lum* v. *Rice*, 275 U.S. 78 (1927),

the Court treated segregation in education as legitimate on the basis of the *Plessy* and *Cumming* cases despite the fact that the basic problem was not argued in the *Gong Lum* case and that it was neither involved in *Plessy* nor decided in *Cumming*.

The result is that if segregation in education is constitutional, it became so under a rule of law that came from no place. So vital a matter should not have rested on dicta without either argument or consideration. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 344 (1938), did observe that segregated education had been "sustained by our decisions." But the cases cited had not in fact considered the precise point and that matter was not involved in the *Gaines* case, which decided only whether a particular type of separation in education was "equal." Nor does *Sipuel* v. *Bd. of Regents*, 332 U.S. 631, and 333 U.S. 147 (1948), add anything on this point.

2. Under the rule of reason created by the precedents, segregation is unreasonable.

If we accept arguendo the *Plessy* case, with its distinction between "reasonable" and "unreasonable" types of segregation, we must place segregated education in the category of the "unreasonable." Segregated transportation is at least of shorter duration, and it is fairly easy to determine whether the proffered alternatives in transportation are in fact equal. Segregated education has more severe consequences, with devastating psychological effects. Furthermore, in segregated education it is impossible in fact to secure or police that equality which *Plessy* assumes must exist. Fifty years of experience teaches that separate education virtually never is equal. As the President's Committee on Civil Rights reported:

> "With respect to education, as well as to other public services, the Committee believes that the 'separate but equal' rule has not been obeyed in practice. There is a marked difference in quality between the educational opportunities offered white children and Negro children in the separate schools."[86]

[86]Report of President's Committee on Civil Rights, *To Secure These Rights* 63 (1947).

Even beyond this, however, there is compelling reason—a reason which goes to the heart of democratic principles of education—for not extending *Plessy* v. *Ferguson* to the field of education. This may be briefly stated:

(1) A democratic society, like any other, seeks to transmit its cultural heritage, traditions and aspirations from generation to generation.[87] While there are many instruments for transmission of culture—the family, the church, business institutions, political and social groups and the schools[88]—in our society the school seems to have emerged as the most important.[89] This was to be expected from the fact that in a democracy citizens from every group, no matter what their social or economic status or their religious or ethnic origins, are expected to participate widely in the making of important public decisions. The public school, unlike the family and other narrower institutions, has thus become the logical agency for giving to all people that broad background of attitudes and skills which should enable them to function effectively as participants in a democracy.

Indeed, this consideration lay behind the whole movement for free compulsory public education. Thus Jefferson stated: "Even under the best forms [of government] those intrusted with power have, in time and by slow operations, perverted it into tyranny; and it is believed that the most effectual means of preventing this would be to illuminate, so far as practicable, the minds of the people at large . . . ."[90] Furthermore, Horace Mann and many others who fought for free public education valued it as an instrument for eliminating the class structure in education, namely the segregation of the rich from the poor, which bred undemocratic attitudes and habits of life. By the same token, opponents of free public education were frequently

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[87]Benedict, *Transmitting our Democratic Heritage in the Schools*, 48 Am. Jour. Sociol. 722 (1943), reprinted in Lee and Lee, *Social Problems in America* 297 (1949).

[88]Myers and Williams, *Education in a Democracy* 164-227 (1942).

[89]Merriam, *The Making of Citizens* 88-89, 211-2, 273-4 (1931).

[90]Quoted in Curti, *The Social Ideas of American Educators* 3 (1935).

those who believed in government by the elite and had little faith in the full development of democracy.[91]

(2) Just as the principle of free public education was the first important step in realizing democratic objectives through our educational system, so completely non-segregated public education is an essential element in reaching that goal. If children have race superiority taught them as infants, we cannot expect them lightly to toss it aside in later life. The answer lies not, however, in simply indoctrinating them with the principle of racial equality. Modern educational theory, formulated in answer to the need of our society for self-reliant individuals voluntarily cooperating with others to meet the everchanging scene in our dynamic civilization,[92] postulates a more thoroughgoing solution. According to this theory, education "is a continuous process from the beginning to the end of life", and it is a "continuous reconstruction of experience."[93] That is to say, each new thing learned is assimilated to some previous thing learned, and the new is in part conditioned by the old. "Education in America must be education for democracy. If education is life and growth, then it must be life within a social group . . . . Schools must be democratic communities wherein children live natural, democratic lives with their companions and grow into adulthood with good citizenship a part of their experience."[94]

(3) This modern educational theory of learning by doing, clearly implies the necessity of non-segregated education. The principle of equality of opportunity regardless of race or creed,

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[91] *Id.* at 101-200.

[92] See Benedict, *op. cit. supra* note 87; Kallen, *The Education of Free Men* cc. 10, 11, 12, 15 (1949); Kilpatrick (Ed.), *The Educational Frontier* c. 2 (1933); The President's Commission of Higher Education, 1 *Higher Education for American Democracy* 5-9, 101-2 (1947); 2 *id.* 3-9; *Brubacher, Modern Philosophies of Education* c. 14 (1939).

[93] Frasier and Armentrout, *An Introduction to Education* 31, 33 (3d ed. 1933).

[94] *Id.* at 32. See also Brubacher, *op. cit. supra* note 92 at 330-1; Dewey, *Democracy and Education* (1916); Mayo, *The Human Problems of an Industrial Civilization* (1933); Lewin, *Resolving Social Conflicts* c. 5 (1948).

so much a part of our American tradition, can be fully achieved only if this element in our cultural heritage is kept alive and allowed to grow. The school, as has been shown, is the most important institution through which this heritage can be transmitted. But, as has likewise been made clear, proper teaching of the principle of equality of opportunity requires more than mere inculcation of the democratic ideal. What is essential is the opportunity, at least in the school, to practice it. This requires that the school make possible continuous actual experience of harmonious cooperation between members of various ethnic and religious groups and thus produce attitudes of tolerance and mutual sharing that will continue in later life.[95] In the segregated school, this desirable environment does not exist. The most important instrument for teaching democracy to all people is thus rendered impotent.

Even for those who believe in the policy behind *Plessy* v. *Ferguson*, that it is impractical to eliminate segregation in all areas of our culture at once, education has usually been the logical step for achieving our ideal of true equality. Since segregated education cannot be effective education for equality, the principle of *Plessy* v. *Ferguson* should not be extended to the schools.

IV.

EQUAL FACILITIES FOR LEGAL EDUCATION HAVE NOT IN FACT BEEN OFFERED TO SWEATT AND, INDEED, SEGREGATED LEGAL EDUCATION CANNOT UNDER ANY CIRCUMSTANCES AFFORD EQUAL FACILITIES. HENCE PETITIONER HAS BEEN DENIED EQUAL PROTECTION EVEN WITHIN THE BROADEST APPLICATION OF PLESSY V. FERGUSON.

Up to this point we have challenged the legality of segregation generally, and particularly in education. But it is perhaps unnecessary to go so far. Petitioner wants to go to the University

[95] See Kallen, *The Education of Free Men* 182-4 *et passim* (1949); MacIver, *The More Perfect Union* c. 9 (1948); Newlon, *Education for Democracy in Our Time* 92-103 (1939).

of Texas Law School. The courts below have concluded that the segregated school is "separate but equal" and, therefore, legitimate. We contend that Texas has not in fact created a segregated law school for Negroes which is equal to its white law school, and indeed that it is impossible for a segregated law school to afford opportunities in legal education equal to an unsegregated school.

In making this argument, we are safely within the boundaries of all precedents, and *Plessy* v. *Ferguson* becomes our direct support. In any interpretation, that case requires equality if segregation is to be permitted, and we contend that there is not and could not possibly be equality here.

The precise point that segregated legal education affords equal education has never been decided by this Court. In the *Gaines* case, 305 U.S. 337 (1938), there was no legal education offered Negroes in Missouri, and the Court, therefore, was required to hold only, as it did hold, that equal facilities must be furnished within the borders of the State. In the *Sipuel* case, 332 U.S. 631 (1948), the majority found that the question whether "separate" legal education was or could be "equal" was not properly presented to it.

In the *Sipuel* case, further considered *sub nom. Fisher* v. *Hurst*, 333 U.S. 147, 152, Mr. Justice Rutledge disagreed with his brethren on the procedural issue, and thus reached the question we have here. Mr. Justice Rutledge observed that the equality required is "equality in fact, not in legal fiction. Obviously no separate law school could be established elsewhere overnight capable of giving petitioner a legal education equal to that afforded by the state's long, established and well-known state university law school."

Freed of the procedural barrier in the *Sipuel* case, we reach Mr. Justice Rutledge's point in this case. We contend that, if the equality required by the Fourteenth Amendment is "equality in fact, not in legal fiction," then clearly this over-night law school, suddenly appearing in Austin and quickly moved to Houston, does not and cannot equal the University of Texas (white).

Its lack of the attributes of equality is shown particularly by the testimony of former Dean Earl Harrison of the University of Pennsylvania Law School (R. 216-23) and Professor Malcolm Sharp of the University of Chicago Law School (R. 341-51).

Petitioner's right to a completely equal legal education is not met if at some future time some other Negro might be able to get equal education in Texas. The decisions establish that petitioner's right is "a personal one." *State of Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351 (1938). "The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasion race, or any other race, but to the rights of individuals." *Perez* v. *Sharp*, 32 Cal. 2d 711, 716, 198 P. 2d 17, 20 (1948). See also *McCabe* v. *Atchison, Topeka & Santa Fe*, 235 U.S. 151 (1914).

The application of this familiar principle means that Texas must give Sweatt the opportunity for education "in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." *Sipuel* v. *Bd. of Regents*, 332 U.S. 631, 633 (1948). Sweatt cannot possibly obtain the equal education to which he is entitled in the special institution set up under the pressure of this case.

This judgment requires us to compare law schools, a very special kind of educational comparison. Grade schools and high schools perhaps can be compared on the basis of physical plant, or teachers' salaries, or types of plumbing, or number of students in the class, or variety of courses offered;[96] but these mechanical approaches to legal education tell only a partial story. The necessary inequality of Texas (colored) is accentuated by factors peculiar to legal education and the standards applicable to grade schools or high schools have little relevance in such comparison. Some of the inequalities in the instant case are also the product of the

[96] For a collection of cases decided for and against Negroes in terms of size of school, value of school property, location of school, length of term, number of teachers, etc., see 103 A.L.R. 713. For a similar approach by Texas in this case, see R. 78.

extremely small size of the school which Texas would require Sweatt to attend (R. 77).

(1) Faculty size is not the exclusive measure of a law school, certainly not where the number of teachers is reasonably large. But the size has great relevance when it is very small. Texas contemplates a faculty of only four at Texas (colored) (R. 454) but lists 28 faculty members for the current year at Texas (white).[97] Although fewer faculty members may be able to give fewer students at the Negro school a greater proportion of time, it will be the time of a jack-of-all-trades—not a specialist. Nor will the student have the benefit of the different faculty viewpoints so beneficial to the law student.

(2) Apart from the faculty size, faculty quality at Texas (colored) will not be equal. The primary and secondary school cases cited above compare teachers as so many interchangeable units of educational machinery. Assuming arguendo the validity of that approach to grade schools, law teachers are not thus fungible. Justice Jackson put it well when he said, "Nothing, not even an alluring new curriculum, can take the place of a sagacious and imaginative teacher. He can impart a sense of the movement and function of law which is needed as part of the study of each field of law."[98]

Very small schools lack the inducements of those somewhat larger to obtain professors of equal distinction. There is little possibility of encountering a number of interested and interesting students in so small a school. Hence, the range of educational experimentation desired by the able teacher is virtually non-existent. Development of the teacher's professional reputation turns upon his achievement of recognition as an authority in a special

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[97] Association of American Law Schools, *Teachers' Directory* 29 (1949-50). The number was 21 when this record was made (R. 369). The Bulletin of the Texas State University for Negroes, School of Law 4 (1949-50) lists six faculty members, including the librarian, at Texas (colored). It does not appear whether these are full-time or part-time faculty members.

[98] Jackson, *The Product of Our Present-Day Law Schools*, 9 Am. Law School Rev. 370, 375 (1939).

field. The small library and the elimination of an opportunity for sufficient specialization keeps the best prospective teachers——usually—from staying in the smallest schools if they go to them at all.[99] The University of Texas has many professors with names great in legal education. It is beyond belief that Texas (colored) can at any time in the predictable future acquire the services of their equals. Certainly it will not be done within a period of time meaningful to Sweatt.

(3) A minimal faculty results in minimal course offerings at the colored school. Well-staffed Texas (white) offered 75 courses for the two semesters of the current academic year; Texas (colored) can offer no such variety.[100]

(4) All these inequalities are accentuated by the lack of other facilities inevitably resulting from the exorbitant cost of attempting to furnish duplicate opportunities. This is well exemplified by differences in the library, the heart of the modern law school. The Austin School has 65,000 volumes of which 30,000 to 35,000 are non-duplicates (R. 455-6). Texas is obtaining for its colored school 10,000 volumes, the bare minimum permitted by the American Law School Association (R. 456).[101] On the basis of pre-war price standards it would cost the state of Texas something over $100,000 to obtain a library for the colored school equivalent in size to the non-duplicate list of the white school.[102] This is $100,000 which Texas shows no present intention of spending,

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[99]These problems are well discussed by Dean B. F. Boyer, University of Kansas City Law School, *The Smaller Law Schools*, 9 Am. Law School Rev. 1469 (1942).

[100]University of Texas Law School Catalogue 25 et seq. (Aug. 1, 1948). The Bulletin of the Texas State University for Negroes, *supra* note 97 at 14-17, lists 39 courses for the two semesters. In making this calculation we have taken the course headings, as listed in the catalogues, as constituting a "course."

[101]The Bulletin of the Texas State University for Negroes, *supra* note 97 at 5, states that the library of Texas (colored) now contains 23,000 volumes. The number of duplicates does not appear.

[102]The calculation is based on Moylan, *Selected List of Books for the Small Law School Library*, 9 Am. Law School Rev. 469 (1939), and the testimony of Hargraves, librarian of the University of Texas law school (R. 142).

and as a practical matter only a large staff of diligent librarians could find such a collection of books in any short time. Without such a library, the kind and quality of research experience given Sweatt will be far inferior to that given the white citizens of Texas.

(5) Texas (colored) gives its graduates an economic opportunity inferior to that of the graduates of the University at Austin. In addition to any economic difficulties Sweatt may meet as a Negro, he would acquire an unequal professional standing by graduation from a segregated law school. Professional careers are seriously affected by the repute in which the school is held by the profession at large. Moreover, Texas (colored) is a raw, new institution not only without prestige but without alumni. Texas thus deprives Sweatt of placement opportunities given to the graduates of the old, established school.[103] Assistance of this kind is most important in the present situation of the Texas bar for, in the words of the Assistant Dean of Texas (white): "It is obvious that the existing firms will not be able to absorb the great number of men being graduated from the law schools in Texas."[104] The placement efforts of Texas (white) based, as they must be, upon the loyalty of alumni and the established reputation of the institution emphasize the inequality of opportunity Texas would give Sweatt.

(6) Work on a law review is considered a desirable part of the training of good law students. The University at Austin has an excellent review on which its students may aspire to serve. Texas (colored) cannot have a law review for lack of a sufficient number of topnotch students to man it. (Cf. R. 105, 310-3, 347.)

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[103] Associate Dean James P. Gifford, Columbia University School of Law, in an extensive report on placement method observed, "Practically all schools use their alumni as sources of information about openings." 9 Am. Law School Rev. 1063, 1066 (1941). Dean Gifford also discussed the value of moot courts, dinners, and speeches as placement aids.

[104] 12 Texas Bar Journal 208 (1949).

(7) The training of moot court work depends in great measure on the quality of competition among groups of students. Moot court activities at Austin are based on such competition (R. 103). Substantial numbers are necessary to create satisfactory competitive groups.

(8) Finally, that part of a legal education which results from doing lawyer's work in a legal aid clinic requires for successful operation a sufficient number of competent students to manage and supervise the novices.[105]

And yet, if by some miracle Texas could surmount all these obstacles, it would still not create an equal opportunity for legal education. If it assembled a staff of the greatest teachers in America; if it spent a large sum to create an equal library; if it afforded equal placement opportunities for every graduate; if it overcame every other difficulty, Texas (colored) would still not be equal. For the segregated plan misses the whole purpose of a modern law school.

The lawyer, to meet the responsibilities of his profession, must have a vital sense of the culture of the community in which he lives and works. "Lawyers are perpetually engaged in trying to anticipate, prevent, mediate, settle or win human disagreements involving alleged rights recognized at law. Their thinking, planning and action are framed and limited by what they understand to be the prevailing principles and doctrines of law—what the judges, or legislatures have decided in like situations before or, more accurately, what they guess judges or legislatures would decide in like situations tomorrow."[106] The knowledge required for these tasks can in part be obtained from books; but a major share must come from intimate knowledge of the ways of thought of the community. "He (the lawyer) is literally lost unless he

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[105]For a description of the work of the Texas (white) legal aid program see Patterson, *The Legal Aid Clinic*, 21 Tex. L. Rev. 423, 426-9 (1943). The Bulletin of the Texas State University for Negroes, *supra* note 97 at 7, states that a legal aid clinic has been established at Texas (colored).

[106]Rostow, *Liberal Education and the Law: Preparing Lawyers for Their Work in Our Society*, 35 A.B.A. Jour. 626, 628 (1949).

can sense the drives, interests (and weaknesses) of those with whom he deals—whether as witnesses, negotiators, judges, clients, or opponents."[107]

Hence it is important that the lawyer receive his training in the group with which he is to live and to practice. In speaking of training in legal ethics, which is one part of this training process, Lloyd Garrison has observed:

> "Thus in classrooms, dormitories, clubs, and playing fields the student gets to know not a handful of neighborhood acquaintances but a cross-section of his contemporaries, drawn from innumerable localities and environments and varying widely in capacities and tastes. He will note them all, and in the activities and competition of the communal life he will perceive the various gradations of excellence which that life reveals in his fellows, and will desire increasingly to resemble those who stand out as the most admirable. In the same manner he will judge his teachers, and will be drawn slowly but certainly to those whose qualities of mind and character shine the most luminously."[108]

The student at Texas (white) will imbibe the lessons not only of character but of the knowledge of human beings from a far larger portion of that "cross-section of his contemporaries" than could any student at a segregated school. In classifying the students at the two schools by the test of color, Texas effectively eliminates much of the cross-fertilization of ideas. When a law student is forced to study and talk the shop talk of justice and equity with a segregated handful, he is circumscribed in the effort to achieve any real understanding of justice or equity. At Texas (colored) Sweatt will lose the opportunity of exchanging ideas with a complete variety of fellow students. He will thus lose part of the opportunity to absorb those received traditions of justice and fairness on which Texas law, like the rest of the Anglo-

[107] *Id.* at 629.

[108] Garrison, Address, American Bar Association Section on Legal Education, Boston, 1936, in 8 Am. Law School Rev. 592, 594 (1936).

American law, is based.[109] The attorney uncultivated in the traditions of justice and fairness is handicapped in advising clients or in dealing with attorneys and judges who are a part of the broad stream of Texas jurisprudence deepened as a result of the years of group association at the Austin school.

This lack of opportunity for full discussion with a group of completely divergent views has other and more technical aspects. Classes themselves must be large enough for presentation and discussion of divergencies. This does not mean that classes must be large in an absolute sense, but Texas (colored) cannot measure up for two reasons: (a) there must be at least enough students to make a sample large enough to include a few good ones; and (b) there must be in the group a divergency of points of view. The method of legal education depends entirely upon that thrust and parry of diverse ideas which cannot exist among a handful of segregated students.

If Texas denies Sweatt an education which is in fact completely equal, it also denies him an opportunity to develop the respect for law essential to the lawyer. Texas cannot make its colored school equal in the eyes of the law without contradicting plain facts. Were such a legal fiction adopted—were Sweatt compelled to live with such an assumption—he would be living falsely. Three years of such living must tend to deprive him of those attributes characteristic of the young lawyer fresh from school, "the humility and perspective, the courage and disinterestedness, the devotion to honest craftsmanship and, above all, the deep feeling that the government should serve all and serve justly."[110]

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[109] "The common law grew up as a taught tradition in the Inns of Court on the basis of the tradition of the courts. It was a taught tradition handed down from lawyer to apprentice from the seventeenth century and is now coming to be a taught tradition of academic law school." Pound, *Social Control Through Law* 50 (1942). See *Rules of the State Bar of Texas*, Art. 3, § 1, 1 Tex. Stat. 696 (Vernon 1947) and *Rule 1, Texas Rules of Civil Procedure* (Vernon 1942).

[110] Jackson, *The Product of Our Present-Day Law Schools*, 9 Am. Law School Rev. 370, 371 (1939).

To all these elements of inequality there must be added the considerations developed in earlier sections of this brief, and in other briefs filed with the Court—that segregated legal education, in common with every form of segregation, perverts and distorts the healthy development of human personality in the group subjected to such discrimination.

The inescapable inequality of Texas (colored) lies in the fact that legal education is not a mere matter of cubic feet of classroom space, or the possession of a few thousand books, or the presence of four lawyers recently become teachers. If, instead, legal education is something alive and vital, if the measure is not cubic feet of air space but the intellectual atmosphere within the walls, if law teachers are appraised as individual men of varying degrees of talent, if education is in large part association, if research and practice are part of the job of legal training, if segregation in law school warps and corrupts the mind and personality of man—if any of these things is true, then certainly this Texas Negro institution is a mockery of legal education and of the equal protection of the laws.

CONCLUSION.

Every branch of the government, in its own way, has the duty of meeting a challenge of our times that Democracy is unreal, a promise without fulfillment. This requires more than words. It requires that we bring our practices up to our pretensions. The account by General Bedell Smith of his experiences as Ambassador to Russia, as reprinted in the *New York Times*, dealt at some length with the publication *Amerika*, which our country distributes in Russia. In the *Times* General Smith reprinted two pictures from *Amerika* as samples of our message to Moscow. One of those pictures was of an unsegregated school room. Is this *really* our message to the world, or must we send a postscript that there is a special exception for young men studying the Constitution of the United States in the State of Texas? The Texas legislature has no authority to answer that question for the rest of America. The equal protection clause has answered it.

We respectfully submit that the judgment below should be reversed.

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FOR THE COMMITTEE OF LAW TEACHERS AGAINST SEGREGATION IN LEGAL EDUCATION

January, 1950.

APPENDIX A.

The Committee of Law Teachers Against Segregation in Legal Education was formed for the purpose of expressing the conviction of many law teachers that segregation in legal education is unconstitutional. The members of the Committee support the general legal positions taken in this brief, but responsibility for the detailed argument rests exclusively with the signers. The members of the Committee are as follows:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 44

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae

---

PHINEAS INDRITZ,
Attorney for American Veterans Committee Amicus Curiae

JANUARY 27, 1950,
Washington, D. C.

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SWEATT v. PAINTER

OCTOBER TERM, 1949

No. 44

BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae

The Issue. This case, and the case of *McLaurin* v. *Oklahoma State Regents for Higher Education* (No. 34, this term) (in which AVC has today filed an *amicus curiae* brief), squarely raise the issue, for the first time, whether it is constitutional for a State to refuse to admit a Negro, solely because of his race or color, into a State college to secure graduate education on the same basis as is afforded to white persons.

The Interest of Veterans in this Case

The American Veterans Committee, Inc. (AVC) is an organization of veterans of World War II who have associated themselves to promote the democratic principles for which they fought.[1] AVC believes that the denial of equality of educational opportunity perpetrated in these cases is

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[1] AVC's *amicus curiae* briefs in the following recent civil rights cases in this Court are illustrative of AVC's views: *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948); *United States* v. *C.I.O.*, 335 U. S. 106 (1948); *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949); *Henderson* v. *United States*, No. 25, Oct. Term, 1949; *McLaurin* v. *Oklahoma State Regents for Higher Education*, No. 34, Oct. Term, 1949.

repugnant to the constitutional guarantee of equal protection of the laws, incompatible with our democratic faith and the principles for which we fought in battle, and inimical to the welfare of the United States.

Veterans of World War II have a special interest in this Court's definitive decision in this case and the *McLaurin* case. Congress provided educational benefits for veterans of World War II *without distinction as to race.* [Servicemen's Readjustment Act of June 22, 1944 (58 Stat. 284, as amended, 38 U. S. C. 693, Vet. Reg. No. 1, Part VIII, following 38 U. S. C. 793) ("G.I. Bill of Rights").] For almost all these war veterans, the last day they will be allowed to initiate study under this legislation is July 25, 1951; and no education or training will be afforded to them under that act after July 25, 1956. The refusal by certain States to admit Negroes to State institutions of higher learning on the same basis as is afforded to white students frustrates the Congressional purpose that all veterans shall have equal opportunity to obtain the educational benefits which they have earned by their wartime services and sacrifices for the nation.

As this case and the *McLaurin* case demonstrate, the States which impose compulsory distinctions between students solely on the basis of race deny equality of educational opportunity to Negroes in three distinct ways:

(1) Negro applicants, usually under the asserted compulsion of State law, are simply denied admission to schools for higher education maintained by the State.

(2) When a Negro applicant asserts his legal rights through court proceedings, the State authorities then deny him equality of educational opportunity by establishing a "separate and inferior" school for him. The separate school is never equal. In this very case, Dean Pittenger, testifying for the respondent State authorities, stated on

direct examination (R. 333): "I am unable to think for a moment of colored institutions and white institutions which do have equal facilities with which I have been associated."

(3) Where the Negro has obtained a court order upholding his claim to higher education, but the financial burden of establishing a separate school of any sort is too great for the State (as Oklahoma's Governor candidly admits, in *McLaurin*, R. 29), the State admits him, but only under conditions which obviously degrade him, or discriminate against him, or otherwise afford him less educational opportunity than is afforded to white students.

In the meantime, years elapse during which the State fails to provide education to Negro students "in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." *Sipuel* v. *Board of Regents of the University of Oklahoma*, 332 U. S. 631, 633 (1948). Petitioner Sweatt applied for admission to the University of Texas Law School four years ago; he is not yet even a law student, while white applicants who applied at the same time are now practicing law. In the *McLaurin* case, eight months elapsed before McLaurin was afforded an opportunity to secure education and then only under humiliating conditions designed to lessen the value of it to him.

Veterans, advanced in years by reason of their military service, must get equality of educational opportunity *now* if at all. They do not have the resources nor the time to file individual suits, carry them to this Court, and then start subsequent suits on the meaning of this Court's mandate, as occurred in *Sipuel*, *supra*, and *Fisher* v. *Hurst*, 333 U. S. 147 (1948); and in *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1939) and *State ex rel. Gaines* v. *Canada*, 344 Mo. 1238, 131 S. W. (2d) 217 (1939). The constitutional prom-

ise of equal protection of the laws and the Congressional grant of education to veterans without distinction as to race can be effectuated only by a clear and complete requirement that no State may, solely because of race or color, refuse to admit a qualified person into any State educational institution on the same basis as is afforded to white students.

THE FACTS

Sweatt applied in February 1946 for admission to the University of Texas Law School in Austin, Texas, the only law school maintained by the State of Texas. He measured up to the required standards for admission to the Law School in all respects except that he is a Negro. He was refused admission only because of his race, on the ground that Texas law forbade the admission of Negroes to the University of Texas (R. 40, 55, 56, 425, 445). He then sought a writ of mandamus in a Texas state court. That court ruled that the refusal to admit him was a denial of equal protection of the laws because Texas had no provision for the legal training of colored persons while providing such training for white persons, but ruled that no writ of mandamus would be granted unless Texas failed within six months thereafter to make available legal education to Sweatt "substantially equivalent to that offered at the University of Texas" (R. 424-426). The State then authorized, but did not actually establish, law courses for Negroes at Prairie View University. Upon this showing the Texas court dismissed the petition for writ of mandamus (R. 426-433) but its order was set aside without opinion by the Texas Court of Civil Appeals and the case remanded for further proceedings (R. 434-435). Texas then proceeded to set up in Austin a make-shift "law school" for Negroes which respondents' witnesses freely admitted "is no fair comparison" with the established and recognized Law School

of the University of Texas (R. 43, 333). This school was later shifted to Houston, Texas (R. 52-53, 28-29).

It is obvious that there is no equality in fact between the two schools, whether viewed from the standpoint of prestige, size and quality of faculty and law library, courses offered, size of student body, physical facilities, opportunity for moot court, legal aid or law review, and almost every other possible criterion of a good law school. Throughout these proceedings, Texas has justified its refusal to admit Sweatt into the University of Texas Law School on the basis of the requirement in the Texas Constitution that "separate schools shall be provided for white and colored children" (Art. 7, sec. 7), and has relied upon the proposition that such refusal does not violate the Federal Constitution. Sweatt, however, has squarely contested this proposition.

After a hearing and testimony on the merits, the Texas courts dismissed Sweatt's petition on the ground that the State may constitutionally provide education in separate schools and has in fact done so with substantial equality in this case (R. 440, 445-461).

I. THIS COURT SHOULD DECIDE THIS CASE BY HOLDING THAT STATE-IMPOSED COMPULSORY RACIAL SEGREGATION IN EDUCATION IS A DENIAL OF EQUAL PROTECTION OF THE LAWS, RATHER THAN SIMPLY BY MEASURING THE PHYSICAL INEQUALITIES OF THE TWO LAW SCHOOLS.

Perhaps the clearest proof that compulsory racial segregation is always discriminatory is that it is virtually impossible to present a case of enforced racial segregation unaccompanied by inequality in some significant respect. Thus the present case, which directly turns on the validity of

Texas law requiring separate schools for white[2] and colored people, also presents a plain picture of gross inequality between the recognized and honored University of Texas Law School and the make-shift, obviously inferior "law school" which the State now offers for Negroes.

But if this Court simply compares the minutiae of the separate physical facilities and avoids the basic issue as to whether State laws requiring separate schools for white and colored students violate the equal protection clause, this Court's decision would be viewed everywhere as a tacit approval of such State laws. Such a decision would help Sweatt but would encourage the continuance of unequal education for thousands of other students.

This Court can not hope for effective amelioration of educational discrimination simply by strict insistence on "equality" of the separate physical facilities in each case which may come before it.[3] The fact is that relatively few cases can come to this Court. Moreover, the cost and time involved in bringing each case through the courts would render the constitutional promise of equal protection largely illusory. And it is common knowledge that the States which require separate schools are the States which not only are least likely to, but actually do not, provide facilities for colored students equal in any way to those provided for white students.

The importance of effective education to the continuance of our civilization in this atomic age makes it imperative

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[2] Perhaps "non-Negro" should be used in lieu of "white" since there are non-white students regularly enrolled in the University of Texas. Thompson, "Separate But Not Equal", 33 *Southwest Review* 105, 106 (Spring, 1948) (Univ. Press, Southern Methodist University, Dallas, Texas); compare *Gong Lum* v. *Rice*, 275 U. S. 78 (1927) (holding that the State of Mississippi which classifies its residents as "white" or "colored," may classify a Chinese as non-white).

[3] Compare *Jones* v. *Board of Education*, 90 Okla. 233, 217 Pac. 400 (1923) with *Patterson* v. *Board of Education*, 11 N.J. Misc. 179, 164 Atl. 892 (1933), aff'd w/o op. 112 N.J.L. 99, 169 Atl. 690 (1934).

that the Court now come to grips with the basic issue whether State laws requiring separate schools for white and colored students are constitutional.

II. THE CONSTITUTIONAL GUARANTEE OF "EQUAL PROTECTION OF THE LAWS" FORBIDS A STATE FROM IMPOSING ON ANY INDIVIDUAL COMPULSORY DISTINCTIONS "BASED WHOLLY UPON COLOR, SIMPLY THAT AND NOTHING MORE."

Chief Justice Vinson, speaking for a unanimous Court, recently said: "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color." *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948).

So clear was the proposition that the Fourteenth Amendment was adopted primarily to prevent impairment of the basic rights of Negroes, that the contemporary opinion of this Court doubted whether the Fourteenth Amendment applied to any State action "not directed by way of discrimination against the negroes." *Slaughter-House Cases*, 83 U. S. (16 Wall.) 36, 70-72, 81 (1873). Although the Fourteenth Amendment was later extended to protect other State invasions of private rights, this Court consistently recognized that the Fourteenth Amendment "was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color," *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 94 (1945), and that "the chief inducement to the passage of the Amendment was the desire to extend Federal protection to the recently

emancipated race from unfriendly and discriminating legislation by the States." *Buchanan* v. *Warley*, 245 U. S. 60, 76 (1917).

Perhaps one of the most comprehensive analyses of the purpose of the Equal Protection Clause is that in *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), in words which deserve repetition:

"The true spirit and meaning" of the Civil War 13th, 14th and 15th Amendments, this Court said in *Strauder*, "cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an *inferior and subject race*, would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, *and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed.* Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race . . . especially needed protection against unfriendly action in the States where they were resident." 100 U. S. at 306. (Emphasis supplied.)

"The Fourteenth Amendment," continued the *Strauder* opinion, "is to be construed liberally, to carry out the purpose of its framers" in order to guarantee "the equal protection of the laws. *What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States*, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made

against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of *a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,*—exemption from legal discriminations, *implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy,* and discriminations which are steps towards reducing them to the condition of a subject race." 100 U. S. at 307-308 (emphasis supplied).

This Court's opinion in *Strauder* then emphasized: ". . . . *The very fact that colored people are singled out . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority,* and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." 100 U. S. at 308. The major aim of the Fourteenth Amendment "was against discrimination because of race or color . . . its design was to protect an emancipated race, and to strike down *all possible legal discriminations* against those who belong to it." 100 U. S. at 310 (emphasis supplied).

Another contemporaneous decision which accurately reflected the true meaning of the Fourteenth Amendment was *Railroad Company* v. *Brown,* 84 U. S. (17 Wall.) 445 (1873) (discussed in detail at pp. 15-16 in AVC's *amicus* brief in *Henderson* v. *United States,* No. 25, this Term, now pending). There, a railroad company which furnished a car for colored people "equal in comfort to the cars reserved for white people" contended that it was not discriminating against colored people by refusing them admittance to the cars reserved for white people. This Court unanimously rejected that early manifestation of the separate but equal theory as "an ingenious attempt to evade a compliance

with the obvious meaning of the requirement . . . this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality." 84 U. S. at 452-453.

Throughout the years, this Court has repeatedly castigated compulsory racial distinctions as "obviously irrelevant and invidious" [*Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944)], "at war with our basic concepts of a democratic society" [*Smith* v. *Texas*, 311 U. S. 128, 130 (1940)], and "immediately suspect" [*Korematsu* v. *United States*, 323 U. S. 214, 216 (1944)]. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" [*Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943)], and therefore "hostility to the race . . . in the eye of the law is not justified . . . is, therefore, illegal" [*Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886)]. These decisions, and the many other decisions of this Court which have voided racial discriminations, have underscored Justice Harlan's memorable insistence that the Civil War Amendments to the Constitution "removed the race line from our governmental systems. . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Plessy* v. *Ferguson*, 163 U. S. 537, 555, 559 (1896) (dissent).

III. THE "SEPARATE BUT EQUAL" THEORY IS AN ABERRATION WHOLLY INCONSISTENT WITH THE FOURTEENTH AMENDMENT, AND HAS NEVER BEEN SQUARELY CONSIDERED AND UPHELD BY THIS COURT WITH RESPECT TO EDUCATION.

The Fourteenth Amendment was incorporated into the Constitution to consolidate the gains of the Civil War

against human slavery and its incidents, and to devitalize the "Black Codes" by which the post-war South sought by force of law to retain the Negroes in their status of inferiority. With the rebirth of the Southern whites' political influence after 1876, and the determined efforts of some of them to keep the colored man down, the sophistic "separate but equal" theory became the scalpel to excise the meaning from the Fourteenth Amendment..

At first the impact of this theory in this Court's decisions was indirect—an inarticulate premise for restricting the rights of Negroes in cases not envolving the constitutionality under the Fourteenth Amendment of State statutes requiring separate accommodations. The luster of this Court's resounding rejection of "Jim-Crow" in 1873 (*Railroad Company* v. *Brown, supra*) turned hazy under the muffled but growing homage to the separate but equal theory in *Hall* v. *DeCuir*, 95 U. S. 485 (1877) (State law forbidding racial segregation on common carriers held invalid as burden on interstate commerce); in *Pace* v. *Alabama*, 106 U. S. 583 (1883) (permitting greater punishment for crime of adultery between persons of different races than for adultery between persons of same race); in *Civil Rights Cases*, 109 U. S. 3 (1883) (holding that Congress can prohibit racial discrimination by States but not by private persons); and in *Louisville, New Orleans, and Tex. Ry Co.* v. *Mississippi*, 133 U. S. 587 (1889) (segregation law applicable only to intra-state commerce held not a burden on inter-state commerce). The separate but equal theory reached its full flower in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896) which upheld a State law requiring racial segregation in intra-state transportation and contained *dicta* approving "separation of the two races in schools" (pp. 545, 544).

Almost a half century ago an eminent sociologist wrote: "The problem of the twentieth century is the problem of the

color line." W. E. Burghardt Du Bois, "The Freedmen's Bureau", 87 *The Atlantic Monthly* 354 (March 1901). Much of the blame for the perpetuation of the problem rests with the Nineteenth Century Supreme Court's coddling and to some extent cynical acquiescence in the proposition that enforced racial segregation can be accompanied by equality —a proposition theoretically conceivable but utterly at war with the practical realities of life. The *Plessy* decision signified the highest sanction to racial segregation enforced by law. It therefore encouraged, and became the touchstone and rationalization for, further segregation under compulsion of law, not only in the fields of transportation and education, but in every aspect of human relations.

Plessy's rationale, however, has never been judicially re-examined. Its language sanctioning compulsory racial segregation by State law as justified by "the established usages, customs and traditions of the people" (163 U. S. at 550) has been applied almost blindly. In our *amicus* brief in *Henderson* v. *United States* (No. 25, this Term, pending), AVC has demonstrated at pp. 14-20, that no decision by this Court, except *Plessy,* supports compulsory segregation in transportation as against a challenge under the Fourteenth Amendment, and, at pp. 21-30, that the rationale and assumptions of *Plessy* were erroneous and inconsistent with the Fourteenth Amendment and with this Court's decisions that racial distinctions are "by their very nature odious," "immediately suspect," "obviously irrelevant and invidious," "at war with our basic concepts of a free society," and "in the eye of the law . . . not justified." *Supra,* p. 10. We shall now show that neither *Plessy,* nor *any other* decision by this Court, has upheld the validity of racial segregation in schools, or, more precisely, the validity of laws requiring separate schools for white and colored people, as against a challenge by an individual under the

Equal Protection Clause. If separate schools for different races are constitutional, it is not because this Court has so held. *Dicta* erecting a chambered Nautilus on a non-existent foundation, and failure to meet and analyze the precise constitutional issue, serve as the only bases for application of the "separate but equal" theory in education.

The first time that segregation in schools was judicially discussed in this Court was in Justice Clifford's concurring opinion in *Hall* v. *De Cuir, supra.* A colored woman passenger on a steamboat on the Mississippi River was ejected from a room set apart by the carrier for white passengers. She sued the carrier for damages under a Louisiana statute requiring common carriers in their "rules covering service to passengers" to "make no discrimination on account of race or color." The Supreme Court invalidated the statute on the ground that it was an unconstitutional regulation of interstate commerce. Justice Clifford's concurring opinion, in which no other justice joined, viewed segregation as proper, and, referring to several State decisions concerning segregation in education, stated: "Questions of a kindred character have arisen in several of the States, which support these views in a course of reasoning entirely satisfactory and conclusive." 95 U. S. at 504. His observations were clearly *dicta.*

Plessy v. *Ferguson, supra,* upholding a Louisiana statute requiring separate coaches for whites and Negroes on an intrastate train, is commonly regarded as the leading case holding that State laws requiring "separate but equal" facilities do not violate the Equal Protection clause of the Fourteenth Amendment. But *Plessy* did not sanction all "separate but equal" requirements based on race. The *Plessy* standard was that only *reasonable* distinctions based on race are constitutional. It regarded as unreasonable, and therefore unconstitutional, any law "requiring colored

people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color." (pp. 549-550.)

The references in the majority opinion to separate schools for colored children were obviously *dicta,* the opinion itself expressly stating that:

> ". . . . the *only issue* made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race." (163 U. S. 537, 549.) (Emphasis supplied.)

Furthermore, *Plessy* did not even purport to uphold the reasonableness and constitutional validity of laws requiring separate schools, but said only that racial segregation in *public conveyances* is not unreasonable, or "more obnoxious to the Fourteenth Amendment than acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which *does not seem to have been questioned,* or the corresponding acts of state legislatures." (p. 551.) (Emphasis supplied.)

However, most of *Plessy's* reliance even for this limited *dictum* was on cases such as *Roberts* v. *Cushman,* 59 Mass. (5 Cush.) 198 (1849), decided *before* the Civil War and *before* the adoption of the Fourteenth Amendment. Moreover, separation on a train, however obnoxious, cannot be equated with, nor its previous tolerance permitted to justify, racial discrimination in the opportunity to acquire a professional education, to raise one's status through education, and with that education to serve the community and the Nation. Here, Sweatt is not being permitted to ride on the

same train to the same destination—he is being *excluded* from the only real Law School in Texas, solely because at least one of his parents was a Negro. In addition, whereas the Court which decided *Plessy* was not presented with factual evidence either as to the reasonableness of distinctions based solely on race or as to the inequalities which result from racial segregation, the evidence in this case conclusively demonstrates that there is no reasonable basis for Sweatt's exclusion from the University of Texas Law School and that the so-called segregation here involved results in gross inequalities in the opportunity to acquire a legal education. Even if the very standard adopted in *Plessy*—that *reasonable* distinctions between white and colored people are constitutional—is here adopted, the unreasonable exclusionary law of Texas should be invalidated, not upheld.

In *Cummings* v. *Richmond County Board of Education*, 175 U. S. 528 (1899), the county school board, while continuing to maintain two white high schools, closed the only county high school accommodating 60 colored children in order to use the building to provide primary school instruction for more than 200 Negro children who were then being denied primary school education. An injunction was sought to restrain the school board from using public tax funds to maintain the white high schools. The plaintiff did not attack the validity of the segregation statute. This Court, referring to argument at the bar that ". . . the vice in the common school system in Georgia was the requirement that the white and colored children of the state be educated in separate schools", said: "But we need not consider that question in this case. No such issue was made in the pleadings. Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate and grammar schools, in the management of which the rule as to separation of the

races is enforced. We must dispose of the case as it is presented by the record." 175 U. S. 528, 543-544. This Court upheld the State court's refusal to grant the requested injunction because ". . . if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools" (p. 544). This Court expressly stated that "different questions might have arisen" if the plaintiffs had instituted "some appropriate proceedings" (p. 545).

Nine years later came *Berea College* v. *Kentucky*, 211 U. S. 45 (1908), affirming the conviction of Berea College for the violation of a Kentucky statute which prohibited any corporation or person from operating a school with both white and Negro students. This Court upheld the conviction on the ground that since Berea College was incorporated in Kentucky under a charter which reserved to the State the power to amend the corporate charter, the statute merely amended the corporation's charter, and did not deprive the corporation of any property rights. This Court said: ". . . it is unnecessary for us to consider anything more than the question of its validity as applied to corporations. . . . Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations." 211 U. S. 45, 54.

In *Buchanan* v. *Warley*, 245 U. S. 60 (1917), invalidating racial segregation in housing, this Court recognized that the constitutionality of laws requiring separate schools for white and colored children had never been decided by the Supreme Court, stating (245 U. S. 45, 81):

> "As we have seen, *this court* has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and *courts of high*

authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given." (Emphasis supplied.)

In *Gong Lum* v. *Rice*, 275 U. S. 78 (1927), a Chinese resident in Mississippi, whose constitution requires the maintenance of separate schools for "white" and "colored" children, was refused admission to a white high school on the ground that she was not a Caucasian. There was no school for Chinese children. She sought a writ of mandamus to compel her admittance to the white school. No question was raised as to the constitutionality of maintaining separate schools. She agreed with the policy of segregation of white people and Negroes, but argued (1) that "because there are no separate public schools for Mongolians . . . she is entitled to enter the white public schools" (275 U. S. at 82); and (2) that "colored" meant "Negro" and hence the State could not classify her as "colored". The following excerpts from her brief indicate the nature of her argument:

> "If there is danger in the association [of white and Negro] it is a danger from which one race is entitled to protection just the same as another. The White race may not legally expose the Yellow race to a danger that the dominant race recognizes and, by the same laws, guards itself against. The White race creates for itself a privilege that it denies to other races; exposes the children of other races to risks and dangers to which it would not expose its own children. This is discrimination." (P. 10, Brief of Plaintiff in Error, No. 29, Oct. Term, 1927.)
>
> "Color may reasonably be used as a basis for classification only in so far as it indicates a particular race. Race may reasonably be used as a basis. 'Colored' describes only one race and that is the negro." (P. 14, Brief.)

". . . No child can complain that he is required to associate in school with children of his own race." (P. 16, Brief.)

"But here, the State of Mississippi ignores the generally accepted meaning of the word 'colored' as denoting a peculiar race, and applies it as a simple adjective describing all persons who do not belong to the white race." (P. 16, Brief.)

This Court rejected Miss Lum's allegation that there was no other school for her by pointing out that there were schools for colored children, and rejected her contention that she should be classified as "white" rather than "colored".

Although the question of the constitutional validity of laws requiring separate schools was not raised, this Court said: "Were this a new question, it would call for very full argument and consideration, but we think it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the Federal courts under the Federal Constitution." 275 U. S. 78, 85. The only decisions cited in support of this statement were *Plessy* v. *Ferguson*, *Cumming* v. *Board of Education*, and several State and lower Federal court decisions. As already shown, the constitutionality of separate schools for white and colored people was not involved in *Plessy* or in *Cumming*, or in *Gong Lum*. Moreover, the court's statement in *Gong Lum* shows that that issue was not examined and decided on the basis of "full argument and consideration".

In *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1939), this Court merely assumed that laws providing separate schools are constitutional when it said that the State "sought to fulfill" its constitutional obligation "by furnishing equal facilities in separate schools, a method the validity of which has been sustained *by our decisions*. *Plessy* v.

Ferguson, 163 U. S. 537, 544; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 160; *Gong Lum* v. *Rice*, 275 U. S. 78, 85, 86. Compare *Cumming* v. *Board of Education*, 175 U. S. 528, 544, 545." (305 U. S. 337, 344.) (Emphasis supplied.)

But the constitutional validity of separate schools for white and colored students was not involved in the *Gaines* case. There were no separate law schools; there was only a white law school in Missouri to which a Negro was denied admission solely because of his color. The State contended that there was no denial of equal protection because the statute provided that Negro residents of Missouri be given tuition assistance in law schools in other States. This Court said (305 U. S. 337, 348):

> ". . . the question whether the provision for the legal education in other states of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection . . . [is] the pivot upon which this case turns."

This Court held that the provision for paying tuition fees of Missouri Negroes to study outside the State, while providing education directly to whites inside the State, did not satisfy the equal protection clause.

Moreover, the "decisions" cited do not support the Court's statement. *Plessy* v. *Ferguson* involved transportation, not education. *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151 (1914), involved "separate" transportation accommodations deemed by this Court to violate the constitution, but did not even mention the constitutionality of separate schools. *Gong Lum* v. *Rice* did not involve the issue of the constitutionality of State laws requiring separate schools; and its *dictum* that such laws were constitutional was made without "full argument and consideration" and was based solely on State and lower Federal court

decisions and on two decisions by this Court which did not involve that issue. And in *Cumming* v. *County Board of Education* this Court specifically stated that the constitutionality of laws requiring separate schools was not an issue in the case.

Sipuel v. *Board of Regents*, 332 U. S. 631 (1948), like the *Gaines* case, involved a State's refusal to admit a qualified Negro applicant to the only Law School maintained by the State. This Court held that such refusal denied Miss Sipuel equal protection of the laws and that the State was obliged to provide law school facilities for her "as soon as it does for applicants of any other group." The constitutionality of laws requiring separate schools was not involved. This is shown by the subsequent history of this case. After the issuance of this Court's mandate, the State promptly established a "separate" law school for Miss Sipuel. She thereupon filed a motion in this Court seeking to compel the State to abide by this Court's mandate. In denying this motion, this Court specifically stated: "The petition for certiorari in *Sipuel* v. *Board of Regents* did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On submission, we were clear that it was not an issue here." *Fisher* v. *Hurst*, 333 U. S. 147, 150 (1948).

IV. THE SEPARATE BUT EQUAL THEORY IS INCONSISTENT WITH THE BASIC AIMS OF OUR NATION. ITS APPLICATION ADVERSELY AFFECTS OUR NATIONAL WELFARE AND OUR INTERNATIONAL RELATIONS. IT HAS BEEN ESPECIALLY DETRIMENTAL BY ITS SANCTION OF A SEGREGATED EDUCATIONAL SYSTEM WHICH HAS UNIFORMLY RESULTED IN INFERIOR EDUCATION FOR COLORED PEOPLE AND ALSO FOR WHITE PEOPLE. IN THE LIGHT OF THESE HARMS THIS COURT SHOULD NOT EXTEND CONSTITUTIONAL APPROVAL TO THE THEORY, PARTICULARLY AS APPLIED TO PUBLIC EDUCATION.

(1) **The American Ideal is wholly inconsistent with compulsory segregation.** Our basic aim of equality of opportunity for all without regard to race was pithily expressed in the Declaration of Independence: "all men are created equal." President George Washington expressed it in another way when he characterized this Nation as one which "gives to bigotry no sanction, to persecution no assistance."[4] Time and again we, the people, fought bloody war to preserve this ideal. We enshrined it in the Constitution after the internecine holocaust of Civil War. The guarantee of "equal protection of the laws" became the epitome of our national policy against racial and religious discrimination. This persistent core of hostility against racial discriminations has been embodied in numerous acts of Congress,[5] decisions of this Court, orders and pronouncements

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[4] Geo. Washington's letter of Aug. 1790 to Hebrew Congregation in Newport, Rhode Island, 30 Washington's Letter Books 19.

[5] *E.g.*, 12 Stat. 805; 13 Stat. 329, 351, 537; 14 Stat. 27, 379, 457; 16 Stat. 3, 67, 140; 18 Stat. 336; 21 Stat. 44; 40 Stat. 1201; 48 Stat. 23; 50 Stat. 320, 357; 52 Stat. 815; 53 Stat. 856, 937, 1148; 54 Stat. 593, 623, 1214; 55 Stat. 363, 405, 491; 56 Stat. 575, 643; 57 Stat. 153; 58 Stat. 536, 874; 59 Stat. 473; 60 Stat. 1030.

of the President,[6] and solemn treaties and international agreements to respect and observe "human rights and fundamental freedoms for all without distinction as to race."[7]

The theory of "separate but equal", imposing on groups the "brand of inferior status," is inconsistent with this American Ideal. Experience, understanding, and logic have all demonstrated that when people are forbidden by law, solely because of their race or religion, from using or doing what others may use or do, they are being treated separately, but not equally. And the facilities which are so separated are not, and cannot, in the light of the realities of life, be regarded as equal.

(2) **The "separate but equal" theory has adversely affected the welfare of our whole Nation, to the detriment of white people as well as colored people.** Its application to support laws requiring separation of people on the basis solely of race has, as Justice Harlan foresaw (*Plessy* v. *Ferguson,* 163 U. S. 537, 560), deepened the divisions between our white and colored population. It stimulates guilt feelings, tensions, hate and fear—whites are afraid of Negroes whom they wrong, just as Negroes hate and fear those who under the rationalization of white supremacy oppress the Negro. It forces too many people to think of

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[6] *E.g.*, Exec. Orders 8587 (5 F.R. 4445); 8802 (6 F.R. 3109); 9346 (8 F.R. 7183, 15419); 9808 (11 F.R. 14153); 9980 (13 F.R. 4311); 9981 (13 F.R. 4313). See President Truman's speech at Lincoln Memorial June 29, 1947 (93 Cong. Rec. A-3505) and Messages to Congress, January 7, 1948 (H. Doc. 493, 80th Cong., 2nd sess.); Feb. 2, 1948 (H. Doc. 516, 80th Cong., 2nd sess.); Jan. 5, 1949 (H. Doc. 1, 81st Cong., 1st sess.); Jan. 4, 1950 (H. Doc. 389, 81st Cong., 2nd sess.).

[7] *E.g.*, Charter of the United Nations, 59 Stat. 1031, 1045-1046, 1213; Potsdam Agreement, Aug. 2, 1945; Treaties of Feb. 10, 1947 with Italy, Rumania, Bulgaria and Hungary (93 Cong. Rec. 6307, 6567, 6573, 6578); Resolution 41 of March 7, 1945 at Inter-American Conference on War and Peace at Mexico City which adopted the Act of Chapultepec (Dept. of State Publ. 2497, p. 109).

themselves as Negroes or as whites, rather than as Americans.

By institutionalizing prejudice, it obstructs efforts to dissolve prejudices through the processes of education and voluntary adjustments. It is "the cornerstone of the elaborate structure of discrimination against some American citizens" and has practically always resulted in "separate and *unequal* facilities for minority peoples." *To Secure These Rights*, Report of the President's Committee on Civil Rights, pp. 81, 166 (Govt. Printing Off., Oct. 29, 1947) (emphasis supplied). It weakens our military strength by preventing maximum competence in our soldiers and defense industry workers, for modern warfare requires not only skilled technicians but a high order of learning ability. It fosters a spirit of violence to civil rights which renders less secure the position of all Americans against other threats to American liberty and freedom. It obstructs economic progress and drags down the whole economic level by reducing markets, curtailing production, and preventing full use of all our potential talents and productive abilities. It causes wasteful duplication of many facilities and services. The color line cannot protect any group from the grave effects and high costs of crime, poverty, relief burdens and disease which it supports. "Bacteria are broad-minded."

The greatest damage of all, however, is the damage to the soul. "The pervasive gap between our aims and what we actually do is creating a kind of moral dry rot which eats away at the emotional and rational bases of democratic beliefs." *To Secure These Rights, supra*, p. 139.

(3) **Our international relations are impaired.** The "separate but equal" theory gravely imperils our relations with the peoples of the world. "It is a day . . . when the eyes of men of all races the world over are turned upon us to see

how the people of the most powerful of the United Nations are dealing *at home* with a major problem of race relations." Foreword by President, Carnegie Corporation, in Gunnar Myrdal *An American Dilemma, The Negro Problem and Modern Democracy* p. viii (1944). Racial segregation in the United States is widely advertised throughout the world. It was utilized by the Nazis and Japanese during World War II in their anti-American propaganda. It has aroused the ire of nations otherwise friendly to us. And it is now continuously and vociferously flaunted by the communist countries in their propaganda against us in this period of the "cold war". See *To Secure These Rights, supra,* pp. 146-148; *Segregation in Washington,* Report of the National Committee on Segregation in the Nation's Capital, pp. 4-10 (Dec. 10, 1948); *Final Report,* FEPC (June 28, 1946), p. 6. Secretary of State Dean Acheson has given expert witness that "the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. . . . An atmosphere of suspicion and resentment in a country over the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries." Letter to FEPC, May 8, 1946, quoted in *To Secure These Rights, supra,* 146-147. And former Secretary of State George C. Marshall, a General of the Army and certainly no starry-eyed dreamer, emphasized at the opening session of the United Nations General Assembly in Paris in the fall of 1948: "Systematic and deliberate denial of basic human rights lies at the root of most of our problems and threatens the work of the United Nations." Quoted in Benjamin V. Cohen, "Human Rights under the United Nations Charter," 14 Law and Contem. Probl. 430, 436 (Summer, 1949). The ugly paint of Jim-Crow obscures the commodity of democracy which we seek to export.

(4) **Segregated education is inferior.** The "separate but equal" theory has been particularly evil in its impact on education. The President's Commission on Higher Education, consisting of 28 eminent civic and educational leaders, said in its Report (*Higher Education for American Democracy*, Vol. II, p. 31; Dec. 1947): ". . . the separate and equal principle has nowhere been fully honored. Educational facilities for Negroes in segregated areas are inferior to those provided for whites. Whether one considers enrollment, over-all costs per student, teachers' salaries, transportation facilities, availability of secondary schools, or opportunities for undergraduate and graduate study, the consequences of segregation are always the same, and always adverse to the Negro citizen." Even the four minority members of the Commission who shrank from the Commission's condemnation of segregation in education, admitted that "gross inequality of opportunity, economic and educational, is a fact." *Ibid.*, p. 29.

The 1944-46 Biennial Survey of Education in the United States, released by the Office of Education, Federal Security Agency, on July 29, 1949 (*Statistical Summary of Education, 1945-46*, pp. 28-29) contains the following illustrative comparisons for the jurisdictions which require separate schools for white and Negro pupils:

	White Schools	Negro Schools
Average length, school term	175 days	170 days
Average pupil-teacher load	28 pupils	35 pupils
Current expense per pupil in average daily attendance	$ 104.66	$ 57.57
Average salary of teachers	$1640.	$1134.

In Mississippi, the white and Negro schools compare as follows:

	White Schools	Negro Schools
Average length, school term	182.6 days	140.7 days
Average pupil-teacher load	30 pupils	42 pupils
Current expense per pupil in average daily attendance	$ 75.19	$ 14.74
Average salary of teachers	$1165.	$427.

And in Texas, where this case arises, the comparisons are as follows:

	White Schools	Negro Schools
Average length, school term	175 days	169 days
Average pupil-teacher load	28 pupils	31 pupils
Current expense per pupil in average daily attendance	$ 123.14	$ 91.22
Average salary of teachers	$1695.	$1315.

The President's Commission on Higher Education noted that "nowhere" in the 17 States which require separate schools for whites and Negroes "did there appear a single institution that approximated the undergraduate, graduate, and professional offerings characteristic of a first-class State university." *Higher Education for American Democracy, supra,* vol. II, p. 31; see also *To Secure These Rights, supra,* pp. 63-64.

These inequalities are not coincidental. ". . . segregation, which is the proclaimed purpose of the Jim Crow legislation, is financially possible and, indeed, a device of economy only as long as it is combined with substantial discrimination." Gunnar Myrdal, *supra,* p. 629. "No small part of the motive back of the South's legal separation of the races in transportation and education is the fact that services for the two races can be made unequal only when administered to them separately. The phrase 'separate and equal' symbolizes the whole system, fair words to gain unfair ends." Gunnar Myrdal, *supra,* vol. II, p. 1353.

(5) **Discrimination in Education breeds discrimination in many other fields.** Educational qualifications are often the basis for exercising citizenship rights and participating in civil government and military affairs. One's educational level also generally affects his opportunity to secure better employment and housing, to enjoy improved recreation, to create in literature and science, to achieve success in business and industry, and to obtain the decencies and amenities of social relations in a democracy. It goes without saying,

therefore, that those whom discrimination denies equal opportunity for education generally find themselves subjected to disadvantages, frequently of a discriminatory nature, in other aspects of life.

(6) **The "separate but equal" doctrine should be rooted out of education NOW.** In the light of the detrimental effects of the "separate but equal" theory, and the widespread inequalities between white and Negro public schools there is no valid justification for subjecting public education to the cancerous myth of "separate but equal". That myth should be rooted out NOW. The United States, having twice fought in World Wars "to make the world safe for democracy", is ready for democracy at home. The first place for democracy rightly ought to be the tax-supported school, which is "perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people" and "is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . ." Justices Frankfurter, Jackson, Rutledge and Burton, concurring in *McCollum* v. *Board of Education*, 333 U. S. 203, 216, 228 (1948).

Those of small and closed minds, who see the end of the white race in America if white and colored students are permitted to attend the same school, are increasingly in the minority, in the South as well as in the North. They are the same type of people who predicted "chaos" when Negro children were first allowed to be educated (see W. E. B. DuBois, *Souls of Black Folk* (1903), p. 32); when this Court ruled that no State may deny to Negroes, solely because of their race, the right to sit on a jury, or to vote, or to purchase and occupy a home, or to work for a living; when this Court ruled Jim Crow laws inapplicable to interstate travel; and, in fact, whenever the Negro made

any advance toward first-class citizenship. Their phobias turned out to be fantasies. There were no riots or revolutionary disturbances.

Similarly, there is no foundation for such phobias with respect to the achievement of democracy in education. Experience has shown that integration in education can be successful, in the South as well as the North. The University of Maryland Law School; Catholic University and Georgetown University in the District of Columbia; West Virginia State University; Union Theological Seminary in Richmond, Virginia; Black Mountain College in North Carolina; and the Armed Forces officers' schools at Fort Benning in Georgia, Randolph Field in Texas, Fort Sill in Oklahoma, Fort Knox in Kentucky, Fort Bragg in North Carolina—all of these are in the South. All of them have Negro and white students, some wholly integrated, some partially integrated, all without untoward incident. (Thompson, *op. cit.* footnote 2 *supra*, at p. 111). These, and many other experiences with segregation and integration have proven "that where the artificial barriers which divide people and groups from one another are broken, tension and conflict begin to be replaced by cooperative effort and an environment in which civil rights can thrive." *To Secure These Rights, supra*, p. 83; *Final Report*, FEPC, p. viii (1946).

The unfortunate truth is that segregated and unequal education will not disappear overnight. The backlog of deficiency, the habits of the people, the accumulated patterns of residential segregation, and other factors are not insignificant obstacles. But the elimination of the State-imposed restrictions of law will provide opportunity for voluntary adjustment by the people. Intercultural problems which the abolition of segregation in education will raise in some schools will not be insoluble problems. Democratic

education has the capacity to meet them. In any event, none of those possible intercultural problems will be anywhere as great as those raised by enforced segregation.

The future of democracy itself is at stake. The welfare of our Nation, the dictates of religion, the logic of reason, the Constitutional promise of equal protection and equal opportunity, all make it clear that the relations of our various racial and cultural groups must rest, not merely on employment and philanthropy, but on their integration into the democratic whole. Education and the removal of arbitrary restrictions are two of the best tools to accomplish such integration. It cannot be accomplished while States are permitted to discriminate in education, in violation of the Constitutional guarantee of "equal protection of the laws".

Respectfully submitted,

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January 27, 1950.
Washington, D. C.

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In The

Supreme Court of the United States

October Term, 1949

No. 44.

HEMAN MARION SWEATT, Petitioner,

v.

THEOPHULUS SHICKEL PAINTER, ET AL.

On a Writ of Certiorari to the Supreme Court of the State of Texas.

BRIEF OF THE STATES OF ARKANSAS, FLORIDA, GEORGIA, KENTUCKY, LOUISIANA, MISSISSIPPI, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE and VIRGINIA, AMICI CURIAE IN SUPPORT OF RESPONDENTS.

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Boyd, "Educational History of the South Since 1865," Studies in Southern History 26
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Congressional Record, 43rd Congress, 2nd Session, p. 1010 (1868) 29
Curry, "Biographical Sketch of George Peabody" 30
Dabney, "The History of Schools for Negroes in the District of Columbia, 1870-1947," Catholic University of America Press, (1939) 29
East St. Louis Journal, Jan. 30, 1950 9
"Higher Education for American Democracy," A Report of the President's Commission on Higher Education, U. S. Government Printing Office, Washington, Dec., 1947 ..... 4, 17

Jackson, "The Development of Permissive and Partly Segregated Schools, Journal of Negro Education, Vol. 16 33
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Murray, "The Negro Handbook, 1949" 7
Myrdal, "An American Dilemma" 7
"National Survey of Higher Education for Negroes," Vol. II 12
New York Times, January 31, 1950 9
Pierce, "Memoirs and Letters of Charles Sumner," (1893) 28
"Religion and Race: Barriers for College," Public Affairs Pamphlet No. 153 17
Semi-Annual Reports on Schools and Finances of Freedmen, 1866-1870, J. W. Alvord 28
Storey, "Charles Sumner," (1900) 28
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In The

Supreme Court of the United States

October Term, 1949

No. 44

HEMAN MARION SWEATT,
Petitioner,

v.

THEOPHILUS SHICKEL PAINTER, ET AL,
Respondents.

Brief of the States of Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee and Virginia, Amici Curiae.

STATEMENT

This brief is filed by the States of Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Virginia in accordance with Rule 27 of this Court.

The purpose of this brief is to reply to the argument which is being urged in this case by the petitioner and those organizations amici curiae supporting him, that this Court should reverse all of its former decisions and declare invalid the provisions of the Constitutions and statutes of seventeen States of the Union, as well as Acts of Congress applicable in the District of Columbia, providing for separate but equal public educational facilities.

A. Purpose and Scope of the Brief

These States do not consider that it is appropriate to take sides in the litigation on the question of fact which is, or was at one time, involved in the case as to the substantial equality of the facilities provided at the law schools in the State of Texas. Indeed, it is doubtful if the record in this case presents any fact issue which is not now moot and beyond the necessity of review by this Court. The determination of equality of the separate Negro law school was made by the State Courts upon evidence dealing wholly with an interim law school which no longer exists. Since the trial, an entirely new and enlarged Negro law school has been established in Texas and is available to petitioner. Except for petitioner's contention that separate schools, even if equal, should be held to be unconstitutional, nothing would remain for this Court to do but affirm or remand the case to the State Court for trial on the existing facts. This estimate of the situation is confirmed by the fact that petitioner grounds his whole appeal and most of his brief on the contention that action of the States in furnishing separate schools for white and Negro students is violative of the Fourteenth Amendment regardless of their degree of equality.

Therefore, this brief is to be confined to the basic constitutional question which, after many decisions thereon by this Court and other Federal and State Courts, the petitioner and those organizations supporting him amici curiae, have again presented to this Court. We shall here be concerned only with the question as to whether this Court should overrule a long-settled principle which vitally and crucially affects the whole public school and higher educational systems of one-third of the States of the Union.

B. Interest of These Amici Curiae

This basic constitutional question is of vital importance to the States herein represented. They have spent millions of dollars in the establishment of separate school systems

and other institutions in accordance with the previous Supreme Court decisions which petitioner seeks to have this Court "review" and "overrule." Petitioner does not limit his attack to the Texas situation. He asks this Court to render a decision which would strike down the separate school laws of at least seventeen States and the Acts of Congress as to the District of Columbia.[1]

These States and their local political subdivisions provide for separate grade schools, high schools, colleges, parks, swimming pools, eleemosynary institutions, and other public facilities in accordance with laws and regulations designed (1) to furnish equal opportunities, privileges, and services, and (2) at the same time protect the public comfort, peace, and order. The relief sought by petitioner and supported by his amici curiae would declare all these regulatory measures unconstitutional. As said in the amicus curiae brief of the C.I.O.:

> "Every argument here advanced against the validity of the Texas constitutional requirement of segregated education is equally applicable to all other segregation based on race differences." (p. 8.)

Petitioner argues that State maintenance of separate public facilities for members of the two races, even if equal in every respect, is unconstitutional. He would destroy the long-recognized police power of the States to maintain the public order, peace, and safety of both races, by furnishing equal educational and recreational advantages under circumstances which would preserve public support, and the comfort, peace, and happiness of both races.

To say that these Southern States are deeply concerned is stating it but mildly. The result of such a decision would be a tragedy to the public generally, both white and Negro, in the States concerned. Support for this position is found in the substantial minority report made by the only mem-

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[1] These constitutional provisions and laws are set out in the Appendix, p. 37.

bers of the President's Commission on Higher Education who actually know the conditions in these States, as follows:

> "The undersigned wish to record their dissent from the Commission's pronouncements on segregation especially as related to education in the South. . . . We believe that efforts toward these ends must, in the South, be made within the established patterns of social relationships, which require separate educational institutions for whites and Negroes. We believe that pronouncements such as those of the Commission on the question of segregation jeopardize these efforts, impede progress, and threaten tragedy to the people of the South, both white and Negro. . . . But a doctrinaire position which ignores the facts of history and the realities of the present is not one that will contribute constructively to the solution of difficult problems of human relationships."[2]

It is difficult to conceive that this attack on the great body of law upon which the public educational systems of seventeen of our States and the District of Columbia is founded, will gain any support in this Court. Since the certiorari has been granted and the case set down for hearing and argument we find that it is being urged that this Court has "wrongly decided" and should "reconsider" and "reverse" its well considered decisions upholding the right of the States to furnish equal educational opportunities in separate schools.

It is said in the briefs that this Court should "boldly" retrace its steps and give to the Fourteenth Amendment a new meaning, contrary to all contemporary as well as subsequent understanding of it. We can well wonder if the brief-makers could not have more properly used the word

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2/ Members signing this report were: Arthur H. Compton, Chancellor Washington University, St. Louis; Douglas S. Freeman, Editor, Richmond Times-Dispatch; Lewis Jones, President, University of Arkansas; and Goodrich C. White, President, Emory University. Volume II, "Higher Education for American Democracy," U. S. Gov. Printing Office, 1947, p. 29.

"recklessly" in the argument they make to this Court. They seem to assume that heretofore great judges and the courts upon which they served were unable to understand and properly construe this fundamental law. They would ignore the conditions of life, the sentiment, thinking, and feelings, of this large segment of our population, with which they are obviously unfamiliar, and futilely, we trust, attempt to change human relationships by getting this Court to adopt a repudiated and doctrinaire construction of the Fourteenth Amendment and infuse in it a meaning never embraced within its scope.

In the seventeen States in which the systems of separate public schools are at stake, the decision in this case is of serious and grave concern. No more important and far reaching question has been presented to this Court in this generation.

ARGUMENT

I.

Equal provisions for both races in separate schools are necessary to maintain public education and public order in the State affected, and they do not constitute discrimination.

The States herein represented recognize that in the operation of their public schools they must not discriminate against any individual, group, or race. They recognize that as long as it is necessary in the interest of public order and safety for them to separate children of the two races in public schools, the separate schools must offer equal facilities so that equal educational opportunities are available to the total student population. This is required by their own laws as well as by the Fourteenth Amendment. These States say that it may be that their own laws have not always been followed in this respect by their educational authorities and local school districts. It may be that in some instances schools for Negroes have fallen below the standards of schools maintained for whites. Yet in some

districts the reverse has been true. In both cases the resulting discrimination to the white or the Negro arises not from the law itself, but from a failure of the authorities to administer the law as its terms require. In either case the individuals affected are entitled to relief through court orders either (1) requiring improvements of the inferior facilities, or (2) admission to the superior facilities.

Thus, discrimination is not implicit in separate schools. If so, a State could not constitutionally maintain separate colleges for men and women. To say that a college for Negroes with equal facilities and an equal number of equally qualified Negro professors is unequal to a corresponding college for whites, is to brand the Negro race with an inferiority to which these States do not subscribe.

Southern laws requiring separate schools apply equally to Negroes and whites. Negroes are not "segregated" any more than the whites are "segregated." In some States and in many cities and school districts Negroes comprise the majority group. The students are given equal educational opportunities in separate schools because these States have determined that to be the only plan by which both public education of their youth and the public support, harmony, and order can be maintained.

Petitioner and his amici curiae beg the question when they argue that separate schools for Negroes and whites, even if equal, are discriminatory and unconstitutional. If they are equal, or substantially so, they are not discriminatory. This is the whole premise upon which previous decisions of this Court approving separate equal facilities have been based. It properly assumes that with the same physical facilities, a given number of Negro students and Negro teachers can have a school offering educational opportunities equal to that of similar physical facilities occupied by the same number of white students and teachers.

As heretofore stated, nothing but a belief in racial inferiority could compel one to doubt the possibility of maintaining equal separate schools. It is safe to say that this

belief is not held by petitioner, his amici curiae, these amici curiae, or this Court. Then of what does petitioner complain in the present system? Is it not a complaint against the lack of personal contact and intermingling of the races socially in Southern schools? Unfortunately, that seems to be the answer; and unfortunately, that brings us to the real necessity for separate schools at this time if public schools and public order are to be maintained simultaneously in these States. Petitioner would ignore and ask this Court to destroy the police power of the States under which they meet the need for separation in public facilities in order to prevent racial conflict, strife, and violence. But this power and the need of its exercise cannot be ignored if the full scope of this case is to be understood.

The racial consciousness and prejudices which exist today in the minds of many people if regrettable and unjustified, are a reality and must be dealt with by States which are required to furnish equality of educational opportunities and at the same time preserve harmony and peace between the two races in their midst. This condition is not understood by many who do not live in it and view it from afar. But the possibility of its existence is beyond question even in the Northern States where there is no density of Negro population. Therein have occurred the Harlem, Chicago, and Detroit race riots.[3] More recently, in St. Louis, Missouri, on June 21, 1949, a public swimming pool was opened to both races. *Life* magazine for July 4, 1949, pages 30-31, reported:

> "... But when the city opened all of its swimming pools to Negroes on June 21 for the first time in history, progress stopped. That afternoon police had to escort 40 Negro swimmers through a wall of 200 sullen whites at the Fairground Park pool. After nightfall bands of white hoodlums took off after any Negroes found anywhere near the park, beating and kicking

[3] Myrdal, *An American Dilemma*, p. 566; Murray, *The Negro Handbook*, 1949, pp. 108-110, 190-191.

them *(opposite)*. It was 2 a.m. before police got things under control. Miraculously nobody was killed, but 15 persons were hospitalized, 10 of them Negroes. It was St. Louis' first serious race riot, and it underscored the inflexibility of the color-line barrier dramatized by the movie *Lost Boundaries* (pp. 64-66). Mayor Joseph Darst quickly took what for practical reasons was perhaps the only possible action. Segregation was restored to St. Louis swimming pools."

The same kind of thing happened when the races were mixed in public swimming pools operated by the Department of the Interior in Washington, D. C. In the issue of *Time* magazine for July 11, 1949, on page 21 under a picture of the violence, the following was reported under the heading "Not Ready Yet":

"These pictures show what happened in the nation's capital last week when the Interior Department decided to enforce a non-segregation policy in public pools where only whites had swum before. The result was two days of small-scale rioting at the Anacostia pool, where 17-year-old Joan Sexton suffered two broken toes under the hoofs of a park policeman's mount *(left)* and eight other persons were injured in a series of nasty scrapes which were broken up finally by police. An Interior Department official blamed the rioting on 'Communist agitators,' regretfully closed the pools, 'until further notice.' 'Washington,' observed the *Evening Star*, 'is not ready for non-segregated swimming.'"

In East St. Louis, Illinois, it was decided by the local Board of Education to have mixed schools on January 30, 1950, after exercising their right to have separate schools for 85 years. About 100 Negro students enrolled in schools previously attended only by white children. Two white children transferred to a school which had been all Negro. At one school there was a noticeable decrease in the number of white students. But police authorities even in that Northern State anticipated violence. All police officers were assigned to 12-hour shifts, detectives changed to their

uniforms, and as many as six men rode in one squad car to guard against any outbreak on the first day of the integration. Nine squad cars were on duty, although normally there are only three in East St. Louis, and five cars from the St Clair County sheriff's department stood by.[4]

And in Alton, Illinois, on January 23, 1950, 175 Negro students appeared at the white schools and attempted to secure admission to the classrooms. The Alton Evening Telegraph, in its lead paragraph of the page-one-story said, "An air of tension prevailed throughout the Alton School system today as 175 Negro students appeared at white schools and sought admission . . ." After presenting themselves at white schools for three days, they returned to the schools provided for Negroes and brought suit to stop payment of State funds to the Alton School District. Various forms of racial disturbances followed.[5]

If these conditions exist in the North, it should be understood that they may exist to a greater extent in the more heavily mixed population of the South.

The Southern States trust that this Court will not strike down their power to keep peace, order, and support of their public schools by maintaining equal separate facilities. If the States are shorn of this police power and physical conflict takes place, as in the St. Louis and Washington swimming pools, the States are left with no alternative but to close their schools to prevent violence. The swimming pools were closed for that reason. However, because of this Court's previous decisions on the constitutionality of equal separate facilities, the swimming pools in St. Louis were reopened on a separated basis. If these decisions are overruled, the power to prevent conflict and violence in schools, pools, and other public facilities will be reduced to (1) termination of the facilities or (2) continuation with police protection for the few who elect to use the facilities. Either

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4/ East St. Louis Journal, Jan. 30, 1950; New York Times, Jan. 31, 1950.

5/ Alton Evening Telegraph, Feb. 5 through 8, 1950.

alternative would destroy the public school and recreational systems of the Southern States.

Petitioner and supporting amici curiae have completely ignored the realities and true reasons for separate educational facilities in the States, North and South, which find it necessary contrary to their assertions, segregation laws are not maintained upon any contention of racial superiority of the majority or minority group. White citizens and students are not always in the majority. That is an idea which passed with the last century and is heard of now only in the opposing briefs. Nor are segregation laws based upon discrimination, prejudice, or hatred.

It can safely be said that there exists no desire to discriminate and no prejudice or hatred against Negroes in the minds of a large majority of white people in the South. On the other hand, it must be admitted that there does exist in the minds of majority segments of both whites and Negroes an abiding prejudice against intimate social intermingling of the two races. Experiences of the past have left marks that no laws or court decisions can erase overnight. It is a mistake for any "observer from afar" to assume that prejudice and fear against "crossing the color line" in intimate social contact are limited to the Southern white man alone. They exist just as strongly in the average Negro man of the South. Negro men do not want their daughters, wives, and sweethearts dancing, dating, and playing with white men any more than white men want their women folk in intimate social contact with Negro men. "White trash" is the hated name which Southern Negroes apply to white men who keep the company of their women folk. Worse names are applied to Negro men who "cross the line." The result in the South today is almost universal antipathy toward intimate mixed social relationships. The results of the disregard of these circumstances in the past have been tragic to both races, physically, socially, and politically. Peace and order have been broken here as in St. Louis, Washington, Chicago, and Detroit.

Schools necessarily involve social contact. With mixed classes, recreation, dancing, games, and social relationships being obnoxious to a majority of both races, the Southern States, with Supreme Court approval, have always attempted to furnish the same facilities and advantages to children of both races in separate schools.

One cannot understand the problem of the State governments unless he is willing to know and face the realities connected therewith. Briefly summarized, the Southern States know that intimate social contact in the same schools will lead to withdrawal of public support of the schools, to physical and social conflicts, and to discontent and unhappiness for both races. Yet the States are faced with two duties:

(1) To furnish equal educational opportunities to their youth, both white and Negro; and

(2) To maintain the public welfare, peace, safety, and happiness for all their citizens, both white and Negro.

Today the States herein represented cannot accomplish both of these objectives except by the maintenance of equal separate public facilities. If this is held to be unconstitutional, the States will fail in one or both of these objectives. Anything to the contrary from those who ridicule this condition from afar should be considered most carefully by this Court. They may think they know our conditions or that they can force an immediate change. On this point the Court would serve all concerned by listening to liberal and fair-minded men who have no prejudice but who have been in the South and know the conditions.[6] The conclusions of a few of them follow:

1. Booker T. Washington, outstanding Negro educator and statesman, said in his *Up From Slavery:*

". . . In all things that are purely social we can be

6/ As said by Booker T. Washington: "As a rule, the place to criticize the South, when criticism is necessary, is in the South—not in Boston." *Up From Slavery,* Booker T. Washington, p. 201.

as separate as the fingers, yet one as the hand in all things essential to mutual progress." (p. 222)

"The wisest among my race understand that the agitation of questions of social equality is the extremest folly, and that progress in the enjoyment of all privileges that will come to us must be the result of severe and constant struggle rather than of artificial forcing . . ." (*Up From Slavery* p. 223)

2. Dr. Ambrose Caliver, leading Negro educator and a member of the N.A.A.C.P., who was a specialist on education of Negroes in the U. S. Office of Education, 1930 to 1945, and senior specialist in the higher education of Negroes since 1945:[7]

". . . In some of the States the mores of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions. . . ." (Vol. II Misc. No. 6, p. 17, *National Survey of Higher Education for Negroes*)

3. Federal District Judge John Paul: (*Simmons v. Atlantic Greyhound*, 75 F. Supp. 166, 1947)

". . . No matter how much we may deplore it, the fact remains that racial prejudices and antagonisms do exist and that they are the source of many unhappy episodes of violence between members of the white and colored races. If it is the purpose of the defendant here to lessen the occasions for such conflicts by adoption of a rule for the separate seating of whites and colored passengers, this court cannot say that such a rule is purely arbitrary and without reasonable basis."

4. Dr. Benjamin Floyd Pittenger, educated in the public schools of Michigan, graduated from Michigan State Normal and the University of Chicago, who taught in the Michigan public schools, in the Universities of Minnesota and Colorado, and became dean of the School of Education of The University of Texas (R. 319) said:

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7 *Who's Who in America*, 1950-51, p. 409.

" . . . my fundamental feeling (fol. 536) about the matter rests in what I conceive to be the effect of the elimination of segregation on the higher level upon segregation upon the lower level. . . . I am unable to see how segregation could be constitutionally maintained below the college level and be unconstitutional at the college level, and so my feeling is that the—my principal fear of the breakdown of segregation on the higher level is what I conceive to be the breakdown, the influence upon segregation in the lower level . . ."

"My judgment is that if segregation were abandoned in the lower level, that it would become as a bonanza to the private white schools of the State, and that it would mean the migration out of the schools and the turning away from the public schools of the influence and support of a large number of children and of the parents of those children, and that those migrants and their parents are necessary because there would be additional tuition involved coming from a group of citizens who are the largest contributors to the cause of public education, and whose financial and moral support is necessary for the continued progress of public education." (R. 325, 326)

"However, that question, I have no means of knowing, but I think it is reasonable to believe that at the present time the attitude of Texas people being what it is to a very considerable degree, that the effect of the abandonment of segregation on the lower level would set back the public school movement in this state, and as one who has devoted his life to an attempt to improve it, I can't regard that with equanimity. If the teachers are not moved with the students, then what becomes of the colored teaching profession in Texas?" (R. 327)

5. Bi-Racial Conference on Education for Negroes in Texas, a committee composed of outstanding educators in Texas, including Dr. J. J. Rhodes, Negro, President of Bishop College; Dr. W. R. Banks, Negro, Principal of Prairie View College; Dr. H. E. Lee, Negro; Dr. T. D. Brooks, Dean of Graduate School, Texas A. & M.; Mrs. Joe E. Wessendorf, past president of the Texas Parent

Teachers Association; and Dr. T. W. Currie of the Austin Theological Seminary: (R. 323)

> "Admission of Negroes to existing state universities for whites is not acceptable as a solution of the problem of providing opportunity for graduate and professional study for Negroes, on two counts: (1) public opinion would not permit such institutions to be open to Negroes at the present time; and (2) even if Negroes were admitted they would not be happy in the conditions in which they would find themselves." (Respondents' Original Exhibit 16, R. 322, 323)

6. Southern Members of President Truman's Committee on Civil Rights, including Senator Frank P. Graham of North Carolina, formerly President of the University of North Carolina and a liberal educator of national recognition living in the midst of this problem:

> "A minority of the committee favors the elimination of segregation as an ultimate goal but . . . opposes the imposition of a federal sanction. It believes that federal aid to states for education, health, research and other public benefits should be granted provided that the states do not discriminate in the distribution of the funds. It dissents, however, from the majority's recommendation that the abolition of segregation be made a requirement, until the people of the states involved have themselves abolished the provisions in their state constitutions and laws which now require segregation. Some members are against the nonsegregation requirement in educational grants on the ground that it represents federal control over education. They feel, moreover, that the best way to ultimately end segregation is to raise the educational level of the people in the states affected; and to inculcate both the teachings of religion regarding human brotherhood and the ideals of our democracy regarding freedom and equality as a more solid basis for genuine and lasting acceptance by the people of the states" (To Secure These Rights, pp. 166-167)

See also the minority report by Southern members of President Truman's Commission on Higher Education, quoted at page 4 supra, in which it was concluded:

> ". . . We believe that efforts toward these ends must, in the South, be made within the established patterns of social relationships, which require separate educational institutions for whites and Negroes. We believe that pronouncements such as those of the Commission on the question of segregation jeopardize these efforts, impede progress, and threaten tragedy to the people of the South, both white and Negro."

It is also worthy of note that both Presidents Franklin D. Roosevelt and Harry S. Truman, outspoken foes of racial discrimination and inequalities, apparently recognized the realities which require separate educational facilities in Southern States and that the system was not discriminatory. Neither advocated abolition of the system. This is especially significant in the case of President Truman because he has not submitted to the Congress the recommendation of the majority of his Civil Rights Committee as to mixed schools. Since he is from Missouri, which maintains separate schools and colleges, it is possible that he understands the reasonableness of local determination to meet local needs so long as the separate schools are equal.

As heretofore shown, loss of the right to furnish equal educational opportunities in separate schools would effectively destroy public education in many Southern States. This result would injure our Negro citizens as much if not more than our white citizens. Far more white people would be able to send their children to private schools and church schools. Without segregation the development of the public school systems of these various States would have been an impossibility. This would have been to the disadvantage of none more than the Negroes.

The tremendous strides which have been made in bringing about the equality of school facilities, teachers' salaries, and all other needs of the schools in these areas are disclosed in the records of these achievements. The fine and friendly relationships between the white and Negro people of the South result from mutual respect for each other and a realistic understanding by two different racial groups.

living side by side, of the problems involved in this situation.

The petitioner's contention in this case, if upheld by this Court, would not solve the problem. To suggest that by a decision in this Court our Negro citizens can be benefitted by changing the established law of this country is unrealistic. Indeed the reverse of the results sought would necessarily follow.

To illustrate this point—it may be stated that if the Meharry Medical School at Nashville, Tennessee, which is now operated on a separate basis for Negroes, were discontinued, only a small percentage of the students there enrolled could gain admission to the other medical colleges or schools even if all such schools of this country were operated upon a non-segregated basis. As now operated, this institution provides for medical education for about 650 students whose services as doctors are greatly needed in this country. The statement has been made by those well acquainted with the facts that upon discontinuance of this school only a very small percentage of the students could possibly get a medical education elsewhere. This is admitted by petitioner in his Appendix to his Brief on Certiorari, page xii, in which he condemns the "quota" system of Northern colleges.

In the many Negro colleges maintained throughout the South, students are trained for the teaching profession to be employed in our separate Negro schools and colleges. If these separate institutions should be discontinued in consequence of a decision of this Court, the result would be a real calamity for Negro education in this country. Actual experience in Northern mixed colleges shows that only a very small number of Negro students are able to meet admission requirements. The Northern college quota system would limit the admission of Negroes to less than 10 per cent of the student body in Texas and other Southern

States. Far more than that number now receive education in separate colleges.[8]

The only solution is the continuance of the system which permitted public schools to be maintained originally in both Northern and Southern States. The furnishing of equal educational privileges and opportunities to all through separate schools does not involve discrimination. If particular schools are unequal, proper relief is available to the individuals affected. If admittance to a separate grade school or university for whites is obtained by individual Negroes because of unequal facilities for their own race, it will be understood by those who are at fault. It will not cause a breakdown in public education generally. This is true because Southern people know and appreciate the fact that Negroes are entitled to equal educational opportunities, and they will share without conflict or resentment the result of any failure on their own part to provide equality.

On the other hand, the continued constitutionality of the separate system furnishes an incentive to Southern States to provide more and better schools, especially in higher education, as the only way in which separation can be maintained for peace, harmony, and the general welfare.

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[8] Of the estimated 75,000 Negroes in colleges in 1947, 85 per cent were attending segregated schools and only 15 per cent were in mixed schools. *Religion and Race: Barriers For College*, Public Affairs Pamphlet No. 153. Likewise, 85 per cent of all Negro doctors and 90 per cent of all Negro dentists are trained in separate schools. *The Saturday Evening Post*, January 24, 1948. The operation of the quota system in the Northern colleges is explained in *Higher Education for American Democracy*, A Report of the President's Commission on Higher Education, Government Printing Office, 1947, p. 35.

II.

The constitutionality of separate equal schools has been settled by previous decisions of this Court, and they should not be overruled.

Petitioner's attack upon the decisions of this Court on this extremely important principle proceeds upon the contention that the decisions were based upon unconsidered action. It is charged that the constitutionality of separation of the races in equal facilities was not passed on by this Court. The mistake in this contention is evidenced by petitioner's later argument that these former cases should be "reviewed" and "overruled." An examination of some of these cases, reveals that the same constitutional question was before the Court and that the opinions were well considered.

In *Plessy v. Ferguson,* 163 U..S. 537, 41 L. ed. 256, the constitutionality of separation of the races in intrastate public conveyances was in issue. This Court said:

> "The object of the (fourteenth) amendment was, undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. . . . The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where political rights of the colored race have been longest and most earnestly enforced." (p. 544)

> "So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of

the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.'" (pp. 550-551)

The dissenting opinion of Mr. Justice Harlan, in *Plessy v. Ferguson, supra,* is quoted and extensively relied upon in the briefs filed on behalf of the petitioner. Mr. Justice Harlan's later opinion in the case of *Cummings v. Richmond County Board of Education,* 175 U. S. 528, 545 (1899) has been overlooked. There an injunction was brought to restrain the board from maintaining a high school for white children without maintaining one for Negro children. The Constitution of Georgia, which provided "' . . . separate schools shall be provided for the white and colored races" was before this Court and quoted in its opinion. It was held that the equitable relief sought was not a proper remedy. In denying the relief Mr. Justice Harlan said:

> "Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the 14th Amendment, a denial by the state to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools can not be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

Both of these opinions were cited by Mr. Chief Justice Taft in writing the unanimous opinion in *Gong Lum v. Rice,* 275 U. S. 78, 72 L. ed. 172 (1927). This was a suit for entrance of a "colored child" to the separate school for white children. Mississippi, unlike most States, had classified Chinese as a "colored race." The Mississippi constitutional provision that "separate schools shall be maintained for children of the white and colored races" is set out in this Court's opinion. This Court concluded:

"The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution. . . .

"In Plessy v. Ferguson, . . . in upholding the validity under the 14th Amendment of a statute of Louisiana requiring the separation of the white and colored races in railway coaches, a more difficult question than this, this court, speaking of permitted race separation, said:

" 'The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.'

"The case of Roberts v. Boston, supra, in which Chief Justice Shaw of the supreme judicial court of Massachusetts, announced the opinion of that court upholding the separation of colored and white schools under a state constitutional injunction of equal protection, the same as the 14th Amendment, was then referred to, and this court continued:

" 'Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, D. C. Rev. Stat. §§ 281-283, 310, 319, as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts' . . . citing many of the cases above named.

"Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white

pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the 14th Amendment. The judgment of the Supreme Court of Mississippi is affirmed."

Since every argument which is advanced by the petitioner in this case is answered by the language of this Court, and is so completely responsive to the contentions here made, we can do nothing more than to call the Court's attention to it.

These holdings are in harmony with others of this Court:

In *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547 (1877) the reconstruction government of Louisiana enacted a statute in 1869 regarding rules of common carriers which contained this clause: "Provided said rules and regulations make no distinction on account of race or color . . ." A steamship master was convicted for removing a Negro from a white cabin in accordance with the ship's rule separating the races. This Court held that the statute was void and that the master was free to make reasonable regulations. Mr. Justice Clifford discusses at length (95 U. S. 504-506) the analogy to school cases, citing cases decided before and immediately after the adoption of the Fourteenth Amendment, holding that the maintenance of separate equal schools was a matter which might be constitutionally decided by each State.[9] In the same opinion on page 508 he discusses the recently adopted Fourteenth Amendment and the Enforcement (Civil Rights) Acts of 1866 and 1870. This contemporaneous construction is entitled to great weight.

Later cases upheld the separate coach laws of Mississippi and Kentucky as to intrastate commerce. *Louisville N.O. & T. Ry. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784 (1890);

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[9] *State v. McCann*, 21 Ohio St. 198 (1871); *Roberts v. Boston*, 5 Mass. 198 (1849); *State v. Duffy*, 7 Nev. 342 (1872); *Clark v. Board of Directors*, 24 Iowa 266 (1868); *Dallas v. Fosdick*, 40 How. (N.Y.) Pr. 249 (1869); *People v. Gaston*, 13 Abb. (N.Y.) Pr. N.S. 160 (1869)

Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244 (1900). And the regulations of a private carrier separating the races in interstate commerce were held to be reasonable and enforceable. *Chiles v. Chesapeake & Ohio Ry.*, 218 U. S. 71, 54 L. ed. 936 (1910).

The provisions of the Fourteenth Amendment were specifically before this Court in *McCabe v. A.T. & S.F. Ry.*, 235 U. S. 151, 59 L. ed. 169 (1914). That was an action to restrain the railroad defendants from making and distinction in service on account of race. The points of error (set out in the report, 235 U. S. 152-156) were that the Oklahoma statute violated the equal protection clause; that it was an invalid exercise of the police power; and that the statute was discriminatory against one class of persons, citing *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, *Ex Parte Virginia*, 100 U. S. 339, 25 L. ed. 676, *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567, *Strauder v. West Virginia*, 100 U. S. 303, 24 L. ed. 664, and others here relied on by petitioner and his amici curiae. The Court below found:

> "2. That it has been decided by this Court, so that the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a State to require separate, but equal accommodations for the two races. . . ."

This Court said, "In view of the decisions of this court . . . there is no reason to doubt the correctness of the . . . second . . . of these conclusions." (235 U. S. 160)

This Court had separate school provisions before it again in *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81 (1908). A Kentucky statute prohibited the teaching of white and Negro students in the same school or college, and penalties were attached for violation of the statute. The college, a private corporation, was convicted for violating the act. Mr. Justice Harlan, dissenting, pointed out that the trial court refused an instruction to the effect that the statute violated the Fourteenth Amendment. 211 U. S. 60. This Court upheld the conviction. The dissent of Mr.

Justice Harlan is particularly informative of his views as to *separate public schools*. Berea College was a private corporation, not a public school. He thought that a statute making it unlawful to teach the races separately at a private institution would be void. But he added,

> "Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at public expense." 211 U. S. 69.

These principles were reaffirmed in *Missouri (Gaines) v. Canada*, 305 U. S. 337, 83 L. ed. 308 (1938), an action to compel the admission of a Negro to the University of Missouri Law School, which was then and is now maintained as a separate institution for white students. In a decision in which *Yick Wo v. Hopkins, Supra, Ex Parte Virginia Supra, Neal v. Delaware Supra, Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, *Norris v. Alabama*, 294 U. S. 587, 79 L. ed. 1097, and other of petitioner's cases were discussed, this Court said with reference to the constitutional provisions in question:

> "The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions." 305 U. S. 344.

> "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separate groups within the State." Ibid. 349.

> "We are of the opinion . . . that petitioner was entitled to be admitted to the law school of the State University *in the absence of other and proper provision for his legal training within the State.*" Ibid. 352. (Emphasis provided throughout.)

This doctrine was not departed from in *Sipuel v. Board of Regents*, 332 U. S. 631, 92 L. ed. 247, (1948) or *Fisher v.*

Hurst, 333 U. S. 147, 92 L. ed. 604 (1948). In the *Sipuel* case the Court, citing the *Gaines* case, said:

> "The state must provide it (education) for her (a Negro citizen) in conformity with the equal protection clause . . . as soon as it does for applicants of any other group" (white students). (words in parentheses added.)

And in the *Fisher* case, the trial Court, after the *Sipuel* decision, instructed the school to (1) enroll the Negro with the white students until a separate school is established, or (2) not enroll any students until that time. If further ordered that if a separate school was established, the Negro was not to be enrolled in the white school. This Court refused to disturb the trial Court's judgment.

We content ourselves with the declaration of this Court in these and other cases cited in the Texas brief, as much for the reasoning of these cases as for the conclusive nature of them upon the question which the petitioner seeks to revive.

In the petitioner's brief the cases of *Shelley v. Kraemer*, 334 U. S. 1, 92 L. ed. 1161 (1948), *Oyama v. California*, 332 U. S. 633, 92 L. ed. 249 (1948), *Takahashi v. Fish and Game Commission*, 334 U. S. 410, 92 L. ed. 1478 (1948) are cited and relied upon with a contention that these cases indicate a trend of thought in this Court which would lead it to overrule this Court's many former decisions on the question of equal separate public facilities.

If the seventeen States and the District of Columbia *prohibited* Negroes from attending public schools, these cases would have some application. In the absence of such a prohibition, which does not and cannot exist, there is not the slightest analogy or precedent provided by these cases in favor of the petitioner.

Restrictive covenants (*Shelley v. Kraemer, supra*) in deeds to real property do not profess to equalize for any racial group the right to acquire property. On the contrary,

such covenants are for the purpose of excluding racial groups from the acquisition of the property involved.

Restrictions upon the right of a racial group to fish in the territorial waters of California (*Takahashi v. Fish and Game Commission, supra*) did not purport to provide the Japanese separate but substantially equal facilities. The law provided only for their exclusion.

Discriminatory presumptions in California's Alien Land Law (*Oyama v. California, supra*) were totally unrelated to the question discussed in this case.

An examination of these cases discloses that none of the justices of this Court considered that the established law of the United States as to separate but equal educational facilities was in any way, even by analogy, involved. This principle was not concerned and could not be so considered. They do not support those who now seek to foster a new doctrine on the country in utter disregard of the chaos which would result therefrom.

In like manner, the cases holding that long standing and systematic exclusion of Negroes from juries is a violation of constitutional rights (*Patton v. Mississippi*, 332 U. S. 463, 92 L. ed. 76 (1947) and similar cases) are entirely inapplicable to this situation. It is one thing to *exclude* from jury service and quite another to *furnish* equal education in separate schools.

The contention that these decisions "portend" action favorable to petitioner by this Court in the instant case, is, we trust, without foundation. All of the so-called "portension" cases are distinguishable from this Court's continuous line of decisions upholding the constitutionality of educational systems which furnish equal privileges and opportunities to all in separate schools. The latter decisions more nearly resemble this Court's recent actions in the *Sipuel* and *Fisher* cases rather than the *Shelley, Takahashi, Oyama,* and *Strauder* cases.

Petitioner contends that the long line of decisions by this Court, by other Federal Courts, and by the State Courts are all wrong because their interpretation of the Fourteenth

Amendment is contrary to the interpretation intended by the Congress and the people when it was submitted and approved. Petitioner and his amici curiae would have this Court believe that they now perceive the intent of the writers and adopters of the Amendment more clearly than the Congressmen, Courts, and Legislatures which were comprised of those who voted upon the Amendment and who gave it contemporaneous interpretation.

There is nothing in contemporary legislation or in Federal and State decisions which indicates any belief that the Fourteenth Amendment required mixed schools for all races, or that it prohibited the furnishing of equal educational privileges to all through separate schools. On the contrary, there is a great amount of contemporary construction and interpretation which points only in one direction: that equality of educational opportunities may be furnished in separate schools for children of the white and Negro races when deemed necessary to preserve the public peace, harmony, and welfare.

Before examining contemporary interpretation of the Amendment, proposed by Congress in 1866 and ratified by two-thirds of the States in 1868, a word should be said about the historical setting. It is interesting to note that separate schools for white and Negro students had been established in Northern States prior to the Civil War.[10] In Massachusetts, the State which furnished the most ardent advocates of freedom, equal protection, and civil rights,[11] an equal protection clause in the State Constitution, the same as the Fourteenth Amendment, had been held not to prohibit the City of Boston from maintaining separate schools for the white and Negro races.[12] Similar separate systems were in effect when the Fourteenth Amendment was voted upon in: Connecticut (Laws of

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10/ *The Education of the Negro Prior to 1861*, p. 18, Carter S. Woodson, 1919.

11/ These included John Quincy Adams, Charles Sumner, Henry Wilson, George S. Boutwell.

12/ *Roberts v. Boston*, 5 Mass. 198 (1849)

Conn., 1835, p. 321; separate schools abolished by Laws of Conn., 1868, p. 206); Illinois (Laws of Ill., 1846, p. 120; Id., 1874, p. 983); Indiana (Laws of Ind., 1869, p. 41); Iowa (Laws of Iowa, 1858, p. 65); Kansas (Laws of Kan., 1868, p. 146); Michigan (abolished, Laws of Mich., 1871, p. 274); Minnesota (abolished, Revised Laws, 1905, sec. 1403); Nevada (Laws of Nevada, 1864-65, p. 426); New Jersey (Laws of New Jersey, 1881, p. 186); New York (Laws of New York, 1864, p. 1281); Ohio (Laws of Ohio, Vol. XLVI, 1847-8, p. 81; Id. 1848-49, p. 17; Revised Stats., 1880, Vol. I, p. 1005); Pennsylvania (Laws of Pa., 1854, p. 623; Id. 1881, p. 76). They continued in operation after the Amendment was adopted, were upheld by State courts,[13] cited with approval by the Supreme Court,[14] and ended only when the people of those States determined that conditions were ready for the change.[15]

After the Civil War, the Federal Government, through the Freedmen's Bureau of the War Department, established the first schools in the South in which Negroes were taught. *These were separate schools exclusively for Negroes.*[16]

During the reconstruction era when many bills were enacted which were considered by Southern people as "Force Bills," no legislation was adopted by Congress which attempted to compel the mixture of the races in the public schools or colleges of this country, although it was many times proposed and defeated.[17]

The Fourteenth Amendment was declared to be duly

13/ Brief of Respondents in Opposition to Petition for Writ of Certiorari, Appendix, pp. 74-85.

14/ *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256 (1896); *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547 (1877); *Gong Lum v. Rice*, 275 U. S. 78, 72 L. ed. 172 (1937).

15/ New York, 1909; New Jersey, 1948; Michigan, 1871.

16 Semi-Annual Reports on Schools and Finances of Freedmen, 1866-1870, J. W. Alvord.

17 Cong. Globe, 42nd Cong., 2nd Sess., p. 396 (1866); J. G. Blaine, *Twenty Years of Congress* (1886) p. 514 et seq.; Pierce, *Memoirs and Letters of Charles Sumner* (1893) pp. 72 and 179 et seq.; Storey, *Charles Sumner* (1900) p. 402 et seq.

ratified on July 28, 1868. Contemporaneous construction of the Amendment by the adopting States was almost unanimous that it permitted continuation of separate equal schools for white and Negro students. Many Northern States retained statutory or constitutional provisions authorizing or requiring school districts to provide separate schools: e.g., Illinois, Indiana, Kansas, Nevada, New Jersey, New York, Ohio, Pennsylvania.

The Southern States ratifying the Amendment included the States of Tennessee, North Carolina, South Carolina, Missouri, Arkansas, Louisiana, Alabama, Georgia, and Florida. Virginia, after first rejecting, ratified on October 8, 1869. Texas ratified February 18, 1870. All of these eleven States within a short time thereafter adopted constitutional and statutory provisions for separate but equal schools for white and Negro children, thereby demonstrating the contemporary understanding of these States that there was no conflict with the Fourteenth Amendment and the principle of separate schools.

The schools of the District of Columbia, before, during, and after the adoption of the Fourteenth Amendment, were maintained by the Congress on a separate basis for white and Negro children. Thus, the very Congressmen who proposed the Fourteenth Amendment could not well have interpreted it to prohibit separate equal schools in the States.[18]

Subsequently the Congress gave contemporaneous construction to the Fourteenth Amendment in its actions on the bill which became the Civil Rights Act of 1875. The original bills in both Houses (S. No. 1 and H.R. 796) prohibited separate schools for white and Negro students. All reference to schools was stricken in the House[19] and this action was concurred in by the Senate.[20]

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[18] Lillian G. Dabney, *The History of Schools for Negroes in the District of Columbia*, 1870-1947, Catholic University of America Press 1939, pp. 21 and 111 et seq.

[19] Congressional Record, 43rd Cong., 2nd Sess., p. 1010.

[20] Ibid., p. 1870.

It is significant to note that the trustees of the George Peabody Fund (a foundation having assets of over $2,000,000, created by George Peabody of Massachusetts, which fund was instrumental in the establishment of many schools in the South) were influential in having the mixed schools provisions taken out of the Civil Rights Act of 1875.[21] More positive interpretation by Congress came with passage of the Act of June 11, 1878 (20 Stat. 107, Chapter 180) which specifically provided for the operation of the public schools of the District of Columbia upon an equal but separate system for white and Negro children. Since their origin in 1862 (12 Stat. 407) the schools of the District of Columbia have continued to be operated in that way[22] under direct authority of the Congress of the United States, the branch of the Government authorized by the Fourteenth Amendment to enforce its provisions.

Contemporaneous interpretation by State courts was the same as that of the Congress and State Legislatures. For example, the New York Court, in *Dallas v. Fosdick*, 40 How. Pr. 249 (1869), stated:

> "It was claimed upon the argument of the appeal taken in this cause, that the provisions of the charter, if they were to be so construed as to exclude colored children from the schools provided for white children, were inconsistent with the act of Congress called the 'civil rights bill,' and had, therefore, become inoperative. But that is very clearly not the case. It was no part of the civil rights bill to regulate or provide for the enjoyment of rights or privileges of the nature of those in controversy in this case." (p. 256)

Similarly, the Indiana Court in *Cory v. Carter*, 48 Ind. 327 (1874) wrote:

21/ Curry, *Biographical Sketch of George Peabody;* Boyd, *Educational History in the South Since 1865,* Studies in Southern History, p. 262.

22/ Public Law 254 of the Fifty-Ninth Congress, H.R. 11,442, passed June 20, 1906 under which separate schools continue to be maintained in the District.

"The action of Congress, at the same session at which the fourteenth amendment was proposed to the states, and at a session subsequent to the date of its ratification, is worthy of consideration as evincing the concurrent and after-matured conviction of that body that there was nothing whatever in the amendment which prevented Congress from separating the white and colored races, and placing them, as classes, in different schools, and that such separation was highly proper and conducive to the well-being of the races, and calculated to secure the peace, harmony and welfare of the public . . . (The court then cites several Acts of Congress relating to separate schools in the District of Columbia)

"The legislation of Congress continues in force, at the present time, as a legislative construction of the fourteenth amendment, and as a legislative declaration of what was thought to be lawful, proper and expedient under such amendment, by the same body that proposed such amendment to the states for their approval and ratification." (pp. 364-366)

See also *State v. McCann*, 21 Ohio St. 198 (1871); *State v. Duffy*, 7 Nev. 342 (1872); *People v. Gaston*, 13 Abb. (N.Y.) Pr. N.S. 160 (1869); *Ward v. Flood*, 48 Cal. 36 (1874); *State v. Board of Education*, 7 Ohio Dec. 129 (1876); *Commonwealth v. Williamson*, 30 Leg. Int. 406 (Pa. 1873).

Contemporaneous construction by this Court is found in *Hall v. DeCuir* (1877), supra, where this Court struck down a State statute requiring a commingling of the races on a steamboat operating in interstate commerce. The contemporaneous construction of the State courts is discussed at length by Mr. Justice Clifford.

Other contemporaneous expressions of this Court upheld the State's police power. For example in *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929 (1873), Mr. Justice Field, concurring said:

"No one has ever pretended . . . that the fourteenth amendment interferes in any respect with the police power of the state . . ."

Following this decision this Court said of the Fourteenth Amendment in *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923[5] (1885):

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, morals, *education*, and good order of the people. . ."

What could be clearer than the statement by Mr. Justice Clifford in *Hall v. DeCuir*, 95 U. S. at 506 (1877):

> "And it is well settled law there that the (school) board may assign a particular school for colored children and exclude them from schools assigned for white children and that such a regulation is not in violation of the Fourteenth Amendment."

This doctrine has been re-emphasized in the many cases heretofore cited. It is respectfully submitted that to overthrow the systems built up over a period of almost a century and following the plan first used by the Northern States and the Freedmen's Bureau as an agency of the Federal Government, would result in utter chaos and confusion which would fully nullify the progress in public education and race relations which the States have made during this period.

All contemporaneous interpretation indicates that separate schols, if equal, were not considered discriminatory against either race and that the system does not contravene the equal protection clause as then or now understood and interpreted.

It is further submitted, as pointed out elsewhere in this brief, that this is a problem for the individual States to solve. Many Northern States which originally followed this plan have, at times when they believed conditions justified their action, provided by statute and in their Constitution for mixed schools. Colorado, Connecticut, Idaho,

Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, and Washington are numbered in this group. It was noted, however, in an article by Reid F. Jackson, "The Development of Permissive and Partly Segregated Schools," *Journal of Negro Education*, Vol. 16, p. 301, that in spite of these provisions, separation in some form has arisen in these States. Other States have provided by statute for permissive separation while some are silent on the subject.

From this brief summary, it would seem that the logical conclusion which follows is that it should remain within the power of the individual States to decide their educational policies. If and when conditions justify a change, they may alter their policies, but due to the varied conditions and relations of the races within the borders of the States, the problem is not one which can be solved by the Federal Government and certainly not by the Court.

To extend the interpretation of the Fourteenth Amendment so far beyond its well settled construction, now or at any time in the future, would seem only to invite disaster for public education in the States which would be affected.

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. ed. 261, 264.

III.

The reasonableness of the separate school laws has been settled by this Court, and the need therefor is a question for the States to decide. If this Court ever goes behind State statutes to make a judicial determination of the reasonableness and need, it should not do so on this record.

Petitioner and his amici curiae urge that the Court should re-examine the question of the need and reasonableness of the classification as to race in the separation of

students. The brief of Texas fully demonstrates that this Court has many times considered this question and approved the classification as reasonable when determined necessary by State Legislatures. This Court has never gone behind the legislative acts to make its own determination of need and reasonableness. It was with this in mind that the record in this case was made in the trial court.

One amicus curiae, the Federal Council of Churches of Christ in America, furnishes one of the strongest arguments for the reasonableness and need of the rule. That is, that the people making up the member churches, both North and South, as a general rule, maintain in actual practice, separate churches, separate church schools, and many separate colleges and universities. The churches and their schools are fine and not the slightest criticism is intended or inferred. But the church schools and colleges, as a general rule, acting on the same compelling reasons that caused the Southern people to write the practice into their Constitutions and laws, have provided for a separation of the races, at least in their colleges in the South. For example, The University of the South (Sewanee), Wake Forest, Baylor, Southern Methodist University, Randolph-Macon, Hardin Simmons University, Howard Payne College, Texas Christian University, College of the Ozarks, Georgetown College, Centenary College, and Furman University. The Federal Council's thesis is against separation of the races. Yet the practice of the members, in the South and only to a lesser degree in the North, is to separate the races not only in education but in worship.

Should the Court determine to examine the reasonableness and need of the classification, it should not do so without giving Texas and these States an opportunity to present their evidence. There should be a fully developed record of the situation in the whole area of this nation in which it is such a basic principle. This case, as we read the record, was tried on the theory that the reasonableness of the rule had been established by this Court in the *Gong Lum*, *Plessy*, *Gaines* and other decisions. The need was

left to the discretion of State Legislatures. Indeed the trial court excluded most of the evidence of petitioner in this regard. With such testimony being excluded, it is reasonably inferred that Texas justifiably did not feel called upon to introduce evidence to refute the excluded testimony. Since all these States will be bound by the decision of this case, they should certainly be allowed to present their witnesses and other evidence before an issue on the reasonableness of and necessity for such laws are determined by this Court. Our contention is that the question is properly legislative. But we desire to present our views in separate cases with fully developed records if this Court ever should decide to go behind the legislative acts to determine such questions.

CONCLUSION

The decisions of this Court, rendered by some of the ablest justices in its history, have firmly established the principle that the States, in the exercise of their police power for the safety, harmony, and welfare of all their citizens, may furnish education to their white and Negro students at separate institutions where substantially equal facilities and opportunities are offered both groups.

The exercise of this police power of the States has been necessary, and this Court has found its exercise to be reasonable and constitutional. The necessity still exists.

The argument that the Fourteenth Amendment was intended to abolish all distinctions based on race in the public schools is completely without foundation. The contemporaneous and later construction by this and other Courts, by the Congress, in maintaining separate schools in the District of Columbia, and by the Legislatures of the various States is to the contrary. The debates on the Fourteenth Amendment, the Civil Rights Acts of 1866, 1870, and 1875, all show that the majority of the very men who proposed the Fourteenth Amendment and the other acts believed the States continued to have the power to establish

and maintain separate schools. They were in fact maintained in a majority of the States.

It is therefore respectfully submitted that this Court should follow its well considered opinions that the States may, in the exercise of their police power, furnish separate equal educational facilities to their white and Negro citizens.

Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions Requiring Segregation in Public Education

ALABAMA

Constitution of Alabama, Article XIV, Section 256:

The Legislature shall establish, organize and maintain a liberal system of public schools throughout the State for the benefit of the children thereof between the ages of seven and twenty-one years. The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age therein, and shall be so apportioned to the schools in the districts or townships in the counties as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships. Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.

CODE OF 1940, Chapter 52, Section 93.

Free Separate Schools For White And Colored.—The county board of education shall provide schools of two kinds, those for white children and those for colored children. The schools for white children shall be free to all white children over six years of age. The schools for colored children shall be free to all colored children over six years of age.

ARKANSAS

ARKANSAS STAT. 1947, ANN., Article 80, Section 509.

Duties And Powers Of School Directors—Budgets.—Indebtedness.—The board of school directors of each district in the State shall be charged with the following powers and perform the following duties:

(c) Establish separate schools for white and colored persons.

DELAWARE

Constitution of Delaware, Article X, Sections 1 and 2.

Section 1. The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means.

Section 2. In addition to the income of the investments of the Public School Fund, the General Assembly shall make provision for the annual payment of not less than one hundred thousand dollars for the benefit of the free public schools which, with the income of the investments of the Public School Fund, shall be equitably apportioned among the school districts of the State as the General Assembly shall provide; and the money so apportioned shall be used exclusively for the payment of teachers' salaries and for furnishing free text books; provided, however, that in such apportionment, no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained. All other expenses connected with the maintenance of free public schools, and all expenses connected with the erection or repair of free public school buildings shall be defrayed in such manner as shall be provided by law.

REVISED CODE OF DELAWARE, 1935, Chapter 71, Section 2631.

Shall Maintain Uniform School System; Separate Schools For White Children, Colored Children, And Moors; Elementary Schools.—The State Board of Education is authorized, empowered, directed and required to maintain a uniform, equal and effective system of public schools throughout the State, and shall cause the provisions of this Chapter, the by-laws or rules and regulations and the policies of the State Board of Education to be carried into effect. The schools provided shall be of two kinds; those for white children and those for colored children. The schools for white children shall be free for all white chil-

dren between the ages of six and twenty-one years, inclusive; and the schools for colored children shall be free to all colored children between the ages of six and twenty-one years, inclusive. The schools for white children shall be numbered and the schools for colored children shall be numbered as numbered prior to the year 1919. The State Board of Education shall establish schools for children of people called Moors or Indians, and if any Moor or Indian school is in existence or shall be hereafter established, the State Board of Education shall pay the salary of any teacher or teachers thereof, provided that the school is open for school sessions during the minimum number of days required by law for school attendance and provided further that such school shall be free to all children of the people called Moors, or the people called Indians, between the ages of six and twenty-one years. No white or colored child shall be permitted to attend such a school without the permission of the State Board of Education. The public schools of the State shall include elementary schools which shall be of such number of grades as the State Board of Education shall decide after consultation with the Trustees of the District in which the school is situated.

FLORIDA

Constitution of Florida, Article XII, Section 12.

White And Colored—Separate Schools.—White and colored children shall not be taught in the same school but impartial provisions shall be made for both.

FLORIDA STATUTES OF 1941, Section 228.09.

Separate Schools For White And Negro Children Required.—The schools for white children and the schools for Negro children shall be conducted separately. No individual, body of individuals, corporation or association shall conduct within this State any school of any grade (public, private or parochial) wherein white persons and Negroes are instructed or boarded in the same building or taught in the same classes or at the same time by the same teachers.

GEORGIA

Constitution of Georgia, Article VIII, Section 2.6601.

System Of Common Schools; Free Tuition.—There shall be a thorough system of common schools for the education of children as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races.

CODE OF 1933, Section 32-909.

School Term, School Property And Facilities.— . . . It shall also be the duty of said Board of Education to make arrangements for the instruction of the children of the white and colored races in separate schools. They shall as far as practicable, provide the same facilities for both races in respect to attainments and abilities of teachers and for a minimum six months of term time, but the children of the white and colored races shall not be taught together in any common or public school.

KENTUCKY

Constitution of Kentucky, Section 187.

In distributing the school fund no distinction shall be made on account of race or color and separate schools for white and colored shall be maintained.

KENTUCKY REVISED STATUTES, Section 158-020.

Separate Schools For White And Colored Children.—(1) Each Board of Education shall maintain separate schools for the white and colored children residing in its district.

(2) No person shall operate or maintain any college, school or other institution where persons of both the white and colored races are received as pupils.

(3) No instructor shall teach in any college, school or institution where persons of both the white and colored races are received as pupils.

(4) No white person shall attend any college, school or

institution where colored persons are received as pupils or receive instruction.

(5) No colored person shall attend any college, school or institution where white persons are received as pupils or receive instruction.

LOUISIANA

Constitution of Louisiana, Article XII, Section 1.

Educational system of state—White and colored schools —Kindergartens.—The educational system of the State shall consist of all free public schools, and all institutions of learning, supported in whole or in part by appropriation of public funds. Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years; provided, that kindergartens may be authorized for children between the ages of four and six years.

MARYLAND

ANNOTATED CODE OF MARYLAND, 1939, Chapter 9, Section 111.

All white youths between the ages of six and twenty-one years shall be admitted into such public school of the State, the studies of which they may be able to pursue; provided, that whenever there are grade schools, the principal and the county superintendent shall determine to which school pupils shall be admitted.

ANNOTATED CODE OF MARYLAND, 1939, Chapter 18, Section 192.

It shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths, between six and twenty years of age, to which admission shall be free, and which shall be kept open not less than one hundred and eighty (180) actual school days or nine months in each year; provided, that the colored population of any such district shall, in the judgment of the county board of education, warrant the establishment of such school or schools.

MISSISSIPPI

Constitution of Mississippi, Article VIII, Section 207.

Separate schools shall be maintained for the children of the white and colored races.

MISSISSIPPI CODE, 1942, ANNOTATED, Chapter 5, Section 6276.

Separate districts for the races—descriptions of districts—Separate districts shall be made for the schools of the white and colored races, and the districts for each race shall embrace the whole territory of the county outside the separate school districts. A regular school district shall not contain less than forty-five educatable children of the race for which the district is established, except where too great distance or impassable obstructions would debar children from school privileges. . . .

MISSOURI

Constitution of Missouri, Article XI, Section 3.

Separate free public schools shall be established for the education of children of African descent.

REVISED STATUTES OF MISSOURI, Section 10, 349.

Separate Schools For White And Colored Children.—Separate free schools shall be established for the education of children of African descent; and it shall hereinafter be unlawful for any colored child to attend any white school or for any white child to attend a colored school.

NORTH CAROLINA

Constitution of North Carolina, Article IX, Section 2.

General Assembly Shall Provide For Schools; Separation Of The Races.—The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one

years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race.

GENERAL STATUTES OF NORTH CAROLINA, Section 115-2.

Separation Of Races.—The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race. All white children shall be taught in the public schools provided for the white race, and all colored children shall be taught in the public schools provided for the colored race; but no child with negro blood, or what is generally known as Croatan Indian blood, in his veins, shall attend a school for the white race, and no such child shall be considered a white child. The descendants of the Croatan Indians, now living in Robeson, Sampson, and Richmond counties, shall have separate schools for their children.

GENERAL STATUTES OF NORTH CAROLINA, Section 115-3.

Schools Provided For Both Races; Taxes.—When the school officials are providing schools for one race it shall be a misdemeanor for the officials to fail to provide schools for the other races, and it shall be illegal to levy taxes on the property and polls of one race for schools in a district without levying it on all property and polls for all races within said district.

OKLAHOMA

Constitution of Oklahoma, Article XIII, Section 3.

Separate Schools For White And Colored Children.

Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained. The term "colored children," as used in this section, shall be construed to mean children of African descent. The term "white children" shall include all other children.

OKLAHOMA STATUTES ANNOTATED, Chapter 15, Section 451.

Separation Of White And Colored Races.—The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the white and colored races, with impartial facilities for both races

SOUTH CAROLINA

Constitution of South Carolina, Article XI, Section 7.

Separate Schools.—Separate schools shall be provided for children of the white and colored races and no child of either race shall ever be permitted to attend a school provided for children of the other race.

CODE OF SOUTH CAROLINA, Section 5377.

Mixed Schools Unlawful.—It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race.

TENNESSEE

Constitution of Tennessee, Article 11, Section 12.

Sec. 12. Education to be cherished; common school fund; poll tax; whites and negroes; colleges, etc., rights of.— . . . The state taxes, derived hereafter from polls shall be appropriated to educational purposes, in such manner as the general assembly shall from time to time direct by law. No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. The above provisions shall not prevent the legislature from carrying into effect any laws that have been passed in favor of the colleges, universities or academies, or from authorizing heirs or distributees to receive and enjoy escheated property under such laws as may be passed from time to time.

CODE OF TENNESSEE, Section 2377.

Schools designated for children; separate schools for white and negro children.—The county board of education

shall designate the schools which the children shall attend; provided, that separate schools shall be established and maintained for white and for negro children.

TEXAS

Constitution of Texas, Article VII, Section 7.

Separate schools shall be provided for the white and colored children and impartial provisions shall be made for both.

VERNON'S TEXAS STATUTES, 1936, Chapter 19, Article 2900.

Separate Schools.—All available public school funds of this State shall be appropriated in each county for the education alike of white and colored children, and impartial provisions shall be made for both races. No white children shall attend schools supported for colored children, nor shall colored children attend schools supported for white children. The terms "colored race" and "colored children," as used in this title, include all persons of mixed blood descended from negro ancestry.

VIRGINIA

Constitution of Virginia, Article VII, Section 140.

White and colored children shall not be taught in the same schools.

CODE OF VIRGINIA, Article 22, Section 221.

White And Colored Persons.—White and colored persons shall not be taught in the same schools, but shall be taught in separate schools, under the same general regulations as to management, usefulness, and efficiency.

WEST VIRGINIA

Constitution of West Virginia, Article XII, Section 8.

Mixed Schools Prohibited.—White and colored persons shall not be taught in the same school.

WEST VIRGINIA CODE OF 1943, ANNOTATED, Section 1775.

Schools For Colored Pupils.—White and colored pupils shall not receive instruction in the same school, or in the same building. The board shall establish one free school, or more if necessary, in any part of the county where there are ten or more colored children of school age living within two miles of a point where a school might be established. And when such schools are established for colored children, the teachers thereof shall be supplied from members of their own race. The board may, if practical, establish a school in a part of the county where there are less than ten colored children of school age.

DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA CODE, Title 31, Section 1110.

It shall be the duty of the Board of Education to provide suitable and convenient houses or rooms for holding schools for colored children, to employ and examine teachers therefor, and to appropriate a proportion of the school funds, to be determined upon number of white and colored children, between the ages of 6 and 17 years, to the payment of teachers' wages, to the building or renting of schoolrooms, and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a thorough, equitable and practical education of colored children in the District of Columbia.

THE NEGRO: NORTH AND SOUTH

By DAVIS LEE

Publisher of The Newark Telegram, Newark, N. J., A Weekly Negro Newspaper

I have just returned from an extensive tour of the South. In addition to meeting and talking with our agents and distributors who get our newspapers out to the more than 500,000 readers in the South, I met both Negroes and whites in the urban and rural centers.

Because of these personal observations, studies and contacts, I feel that I can speak with some degree of authority. I am certainly in a better position to voice an opinion than the Negro leader who occupies a suite in downtown New York and bases his opinions on the South from the distorted stories he reads in the Negro Press and Daily Worker.

The racial lines in the South are so clearly drawn and defined there can be no confusion. When I am in Virginia or South Carolina I don't wonder if I will be served if I walk into a white restaurant. I know the score. However, I have walked into several right here in New Jersey where we have a civil rights law, and have been refused service.

The whites in the South stay with their own and the Negroes do likewise. This one fact has been the economic salvation of the Negro in the South. Atlanta, Georgia, compares favorably with Newark in size and population. Negroes there own and control millions of dollars worth of business. All the Negro business in New Jersey will not amount to as much as our race has in one city in Georgia. This is also true in South Carolina and Virginia.

New Jersey today boasts of more civil rights legislation than any other State in the Union, and the State government itself practices more discrimination than Virginia, North Carolina, South Carolina or Georgia. New Jersey employs one Negro in the Motor Vehicle Department. All of the States above mentioned employ plenty.

No matter what a Negro wants to do, he can do it in the South. In Spartanburg, South Carolina, Ernest Collins, a

young Negro, operates a large funeral home, a taxicab business, a filling station, grocery store, has several buses, runs a large farm and a night club.

Collins couldn't do all that in New Jersey or New York. The only bus lines operated by Negroes are in the South. The Safe Bus Company in Winston-Salem, North Carolina, owns and operates over a hundred. If a Negro in New Jersey or New York had the money and attempted to obtain a franchise to operate a line, he would not only be turned down, but he would be lucky if he didn't get a bullet in the back.

Negroes and whites get along much better together in the South than Northern agitators would have you believe. Of course, I know that there are some sore spots down there, and we have them up here also. But it is not as bad as it is painted. The trouble in the South stems from dumb, ignorant whites and Negroes, not from the intelligent, better class element of the two races.

The attitude of the Southerners toward our race is a natural psychological reaction and aftermath of the War Between the States. Negroes were the properties of these people. They were not the peers, and were not even considered human in the true sense. The whole economy of the South was built around slavery. The South was forced by bloodshed and much harm to its pride, to give up slavery. Overnight these slaves became full fledged American citizens enjoying the same rights as their former owners.

Certainly you couldn't expect the South to forget this in 75 or even 150 years. That feeling has passed from one generation to another, but it is not one of hatred for the Negro. The South just doesn't believe that the Negro has grown up. No section of the country has made more progress in finding a workable solution to the Negro problem than the South. Naturally Southerners are resentful when the North attempts to ram a civil rights program down their throats.

I have pointed out in dozens of editorials that the white

people of this country are not only our friends, but they want to see us get ahead as a race. As a matter of fact, we are more prejudiced than those whom we accuse of being prejudiced.

The entire race problem in America is wrong. Our approach is wrong. We expend all our energies, and spend millions of dollars trying to convince white people that we are as good as they are, that we are an equal. Joe Louis is not looked upon as a Negro but the greatest fighter of all time, loved and admired by whites in South Carolina as much as by those in Michigan. He convinced the world, not by propaganda and agitation, but by demonstration.

Our fight for recognition, justice, civil rights and equality should be carried on within the race. Let us demonstrate to the world by our living standards, our conduct, our ability and intelligence that we are the equal of any man, and when we shall have done this the entire world, including the South, will accept us on our terms. Our present program of threats and agitation makes enemies out of our friends.

SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 44

HEMAN MARION SWEATT,
Petitioner,

v.

THEOPHILIS SHICKEL PAINTER *et al.*,
Respondents.

On a Writ of Certiorari to the
Supreme Court of the State of Texas

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AND B'NAI B'RITH (ANTI-DEFAMATION LEAGUE) AS *AMICI CURIAE*

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Other Authorities

Bond, Horace Mann, Education of the Negro in the American Social Order (1934) 34, 37
Boykin, Leander L., The Status and Trends of Differentials Between White and Negro Teachers' Salaries in the Southern States, 1900—1946, 18 J. of Negro Ed. 40 (1949) 32

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Caliver, Ambrose, Availability of Education to Negroes in Rural Communities, Office of Ed., Dept. of Interior, Bulletin No. 12 (1935) 32

Davis, A. and Dollard, J., Children of Bondage (1940) 37

Embree, Edwin R., Brown America (1931) 33

Gallagher, B. G., American Caste and the Negro College (1938) 37, 38

Johnson, Chas. S., The Negro in American Civilization (1930) 33

Long, Some Psychogenic Hazards of Segregated Education of Negroes, 4 J. of Negro Ed. 336 (1935) 38

Long, The Intelligence of Colored Elementary Pupils in Washington, D. C., 3 J. of Negro Ed. 205-22 (1934) 38

46 Mich. L. Rev. 639 (1948) 9

Moton, Robert R., What the Negro Thinks (1929) 33, 37

Newbold, N. C., Common Schools for Negroes in the South, The Annals of the Amer. Acad. of Polit. & Soc. Science, Vol. 140, No. 229 (Nov. 1928) 32

Phelps — Stokes Fund, Educational Adaptations: Report of Ten Years' Work, 1910—1920 33

Report of a Survey of the Public Schools of the District of Columbia Conducted Under the Auspices of the Chairmen of the Subcommittees on District of Columbia Appropriations Committees of the Senate and House of Representatives, U. S. Gov't Printing Off., Washington, D. C. (1949) 27

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Report of the President's Commission on Higher Education, Higher Education for American Democracy: Vol. II, Equalizing and Expanding Individual Opportunity (1947) 33

Segregation in Public Schools—A Violation of "Equal Protection of the Laws", 56 Yale L. J. 1059 (1947) 38

Survey of Higher Education for Negroes, U. S. Office of Ed., Misc. No. 6, Vol. II, U. S. Gov't Print. Off., Wash. D. C. (1942) 33

The Availability of Education in the Texas Negro Separate School, 16 J. of Negro Ed. 429 (1947) 33

Thompson, Chas. H., Court Action the Only Reasonable Alternative to Remedy the Immediate Abuse of the Negro Separate School, 4 J. of Negro Ed. 419 (1935) 31

Thompson, Chas. H., The Critical Situation in Negro Higher and Professional Education, 15 J. of Negro Ed. 579 (1946) 32

Waite, Edward F., The Negro in the Supreme Court, 30 Minn. L. Rev. 219 (1946) 21

Woofter, Thomas J. Jr., The Basis of Racial Adjustment (1925) 33

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---

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AND B'NAI B'RITH (ANTI-DEFAMATION LEAGUE) AS *AMICI CURIAE*

Interest of the *Amici* *

This brief is filed, with the consent of both parties, on behalf of the American Jewish Committee, and the Anti-Defamation League of B'nai B'rith.

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* The Appendix contains a description of the organizations appearing as *amici curiae*.

Both of these organizations are dedicated to the preservation of democratic rights guaranteed all citizens by our Federal Constitution. Each has long since recognized that the invasion of the rights of any individual or group on the basis of race undermines the foundation of rights guaranteed to all groups in our democracy.

The present case causes us deep concern because the pattern of discrimination in segregated educational facilities has deprived millions of Americans of equality of opportunity and has perpetuated an abhorrent caste system. In the light of sociological and psychological insights gained from experience with segregated school systems it is clear that compulsory segregation results in physical, social, intellectual and economic inequality for the Negro and any other segregated group. These inequalities give rise to and strengthen the effect of inequalities in other areas of human activity, for such inequalities compound each other.

Beyond this, we are concerned with the fact that segregation has become an effective threat to the very foundation of our democratic way of life. If a State can require segregation in education for Negroes, it can also require it for Chinese, see *Gong Lum* v. *Rice*, 275 U. S. 78, for Mexicans, see *Westminster School District* v. *Mendez*, 161 F. (2d) 774, or for any arbitrarily selected group. Segregation maintains the racist doctrine that undesirable social traits and inferior mental capacities inhere not in the individual, but in the group. This concept must be excised from the fabric of our society. Certainly a first step is to remove it from our law.

It should be stated finally that we are fully aware that implicit in the defense by some of segregation and of the "separate but equal" doctrine is the fear that a destruction of the barriers of segregation will give rise to increased racial tensions. We believe that the ugly prejudices which create such tensions batten on segregation.

A decision by this Court eliminating racial segregation in education will strengthen the democratic relationships among the various groups in our population. This issue must be faced honestly and boldly.

Opinions Below

The judgment of the Supreme Court of the State of Texas refusing the application for writ of error to the Court of Civil Appeals for the Third District, dated September 29, 1948, without opinion, appears on page 466 of the record. The order, dated October 27, 1948, overruling the motion for a rehearing, without opinion, appears on page 471 of the record. The opinion of the Court of Civil Appeals, dated February 25, 1948, appears at page 445 of the record, and that of the District Court of Travis County, dated June 17, 1947, is reported at page 438.

Jurisdiction

Jurisdiction is invoked under Title 28, United States Code, section 1257 (3).

Statement of Facts

The petitioner in this case, Heman Marion Sweatt, sought admission to the School of Law of the University of Texas. He concededly met all of the academic qualifications, but the authorities of the University denied him enrollment because he is a Negro.

In the State of Texas in accordance with statutory and constitutional provisions the maintenance of separate schools for whites and Negroes is compulsory. The

University of Texas Law School which Sweatt sought to enter is maintained for white students only.

On May 16, 1946, Sweatt brought an action in mandamus in the District Court of Travis County, Texas, to compel the members of the Board of Regents of the University of Texas, and others, to admit him as a student. That court, after a hearing, entered an order finding that Sweatt was denied the equal protection of the laws since no provision had been made by the State of Texas for his legal training.

The District Court did not, however, grant the writ of mandamus but rather adjourned further consideration of the action until December 17, 1946, giving the respondents six months time within which to produce a course of legal instruction substantially equivalent to that provided for white students at the University of Texas.

At the second hearing on the application for the writ, which took place December 17, 1946, the State of Texas attempted to show the availability of a law school for Sweatt by presenting to the court a copy of a resolution adopted November 27, 1946, by the Board of Directors of Texas A. & M. College to the effect that if Negro applicants for law school training were to present proper evidence of the required academic qualifications they would be admitted to a law school for Negroes to be established in Houston, Texas for the semester beginning February 1947. There was no evidence produced, however, to show that a law school for Negroes had actually been established.

On the basis of this representation at the December 17th hearing the court entered a final order denying the petition.

This judgment was set aside without opinion by the Court of Civil Appeals, and the cause was remanded for further proceedings without prejudice to the right of any party.

Meanwhile, the State authorities established a separate Negro law school in premises rented in an office building in Austin, Texas, for a period to begin sometime in the latter part of February or early March 1947, and to end on August 31, 1947. A description of the facilities provided for this law school is given in Point IV of the argument, *infra*.

In May 1947, by amendment and supplementation of the original pleadings, the petitioner and respondents joined issue on the question whether the establishment of this separate Negro law school during the period of proceedings on the appeal was sufficient compliance with the equal protection clause of the Fourteenth Amendment and, therefore, whether the refusal to admit Sweatt to the School of Law of the University of Texas was arbitrary and in violation of the Fourteenth Amendment.

The trial on this issue was held before the district court sitting without a jury. Judgment was rendered for respondents. This was affirmed on appeal to the Civil Court of Appeals. Writ of error was refused by the Supreme Court of the State of Texas.

Summary of Argument

The following arguments will be urged in this brief:

I. This Court has never before decided on the constitutional validity of racial segregation in public education. The Court has, in *dictum*, signified its approval of the "separate but equal" doctrine as applied to education, but has never ruled specifically whether racial segregation in education is within the "equal protection of the laws" provision of the Fourteenth Amendment.

II. Racial segregation in public educational institutions is an arbitrary and inadmissible classification under the "equal protection" clause of the Fourteenth Amendment.

This Court has ruled that legislative classification based on race alone is a denial of equal protection except where the national safety is imperilled or there is a pressing public necessity. Racial segregation in public educational facilities is clearly not accompanied by any "pressing public necessity" and must, therefore, fall under the ban of the Fourteenth Amendment.

III. The "separate but equal doctrine" originated by this Court in *Plessy* v. *Ferguson* had no basis in then existing legal precedent and is an anachronism in the light of present-day legal and sociological knowledge.

The cases cited by the majority of this Court to support its decision in the case of *Plessy* v. *Ferguson* set no precedent on the questions under consideration in the case. Although many cases have since cited the "separate but equal" doctrine of the *Plessy* case it has never since been re-examined and affirmed by this Court. Neither is the racial classification embodied in the statute under consideration justifiable as an exercise of police power.

IV. Racial segregation in public education results in inequality and is a form of discrimination.

This Court has recently stricken down many forms of discrimination in such fields as housing, ownership of land, eligibility for employment and in jury duty. The Court has particularly opposed discriminatory practices "rooted deeply in racial, economic and social antagonisms."

The "separate but equal" doctrine urged here stresses that separation is not discrimination where physically

equal facilities are provided, but the "separate but equal" doctrine is a fiction which must be pierced. Segregation results in social, intellectual, physical and economic inequality and hence is discriminatory.

Social inequality is an inevitable concomitant of segregation. The premise of *Plessy* v. *Ferguson* that segregation does "not necessarily imply the inferiority of either race to the other" is invalid.

Intellectual inequality results where students in one racial group are separated from others so that they cannot share in intellectual discussion in law classes, in law review work, in moot courts and the like.

The physical equality supposedly guaranteed by the "separate but equal" doctrine does not exist in fact. The physical facilities afforded white students in Texas are far superior to those provided for Negroes, and the University of Texas Law School for white students is incomparably superior to the law school provided for Negroes. Nor can physical equality in dual school systems be achieved in the future.

Economic inequality also inheres in racial segregation in education. The legal profession is peculiarly one in which social relationships lead to economic opportunities which shape a lawyer's career. Negroes denied the fullest possible social relationships are deprived of economic rights.

Therefore, this Court is asked to overrule its decision in the case of *Plessy* v. *Ferguson* and to hold that racial segregation in public education is violative of the equal protection clause of the Fourteenth Amendment.

POINT I

The validity of racial segregation in public educational facilities has never before been decided by this Court.

This Court is here asked to determine the validity of constitutional and statutory provisions of the State of Texas which require racial segregation in public educational facilities. Despite the transcendent importance of the question, this Court has not yet ruled directly on the constitutionality of segregation in public education. It has decided similar problems, such as the validity of racial segregation in transportation and in housing. It has decided matters relating to educational segregation where the validity of segregation was assumed but not in question. But this Court has never before ruled flatly and specifically on the validity under the Fourteenth Amendment of racial segregation in education.

Following the adoption in 1868 of the Fourteenth Amendment, the earliest case in which some reference was made by this Court to racial segregation in education was *Hall* v. *DeCuir*, 95 U. S. 485, which involved the validity of a State statute prohibiting segregation by race in public carriers. That statute was declared unconstitutional as an improper regulation of foreign and interstate commerce. In a concurring opinion, Mr. Justice Clifford reviewed with approval the conclusions of a number of State cases which had upheld the reasonableness of racial segregation in education and stated in dictum that segregation in the public schools did not violate the Fourteenth Amendment if physically equal school facilities for Negroes were preserved.

In 1896 this Court decided *Plessy* v. *Ferguson*, 163 U. S. 537, which sustained the constitutionality of a Louisiana statute which required public carriers to furnish separate but equal coach accommodations for whites and Negroes. The Court cited with approval several ancient State cases which had held that a State could require the segregation of racial groups in its educational system provided that facilities for all groups were physically equal.*

The constitutionality of "separate but equal" facilities in education was concededly not before the Court in either the *Hall* or the *Plessy* cases. Yet, although there was no basis for a discussion of equal facilities in education, and in spite of the fact that the statements of the Court were dicta, the *Plessy* case was subsequently employed by State and lower federal courts to proclaim the legality of segregation in educational institutions. See cases cited in 46 MICH. L. REV. 639, 643 (1948).

Three years later, this Court decided *Cumming* v. *County Board of Education*, 175 U. S. 528. There, an injunction was sought to restrain the board of education from maintaining a high school for white children where none was maintained for Negro children. The State court had upheld the board of education, saying that its allocation of funds did not involve bad faith or abuse of discretion. In upholding the decision of the State court, Mr. Justice Harlan stated expressly that racial segregation in the school system of the State was not in issue.

The next case before this Court which involved compulsory educational segregation was *Berea College* v. *Kentucky*, 211 U. S. 45, wherein the validity of a State statute which prohibited domestic corporations from teaching white and Negro pupils in the same private educational institution was attacked. While the scope of the statute was

* See our fuller discussion of the *Plessy* case, Part III, *infra*.

broad enough to include individuals as well as corporations, this Court said, at 54,

> —it is unnecessary for us to consider anything more than the question of its validity as applied to corporations. * * * Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations.

This Court supported the reasoning of the State court that the statute could be upheld as coming within the power of a State over one of its own corporate creatures. The statute was considered not to have embodied a deprivation of property rights. The rights of individuals were not considered.

Not until 1927 did racial segregation in educational institutions again become the subject of controversy before this Court. In *Gong Lum* v. *Rice*, 275 U. S. 78 a Chinese contested the right of the State of Mississippi to exclude her from the high school for whites, and to assign her to the colored school under the State's segregated school system. The State contended that under its constitutional provision requiring that separate schools be maintained for children of the white and colored races, the plaintiff could not insist on being classed with the whites and that the legislature was not compelled to provide separate schools for each of the colored races.

The issue of segregation was not presented in this case. The plaintiff accepted the system of segregation in the public schools of the State, but contested her classification within that system. Since she did not contest the practice of segregating Negroes from whites, segregation was not in question.

Nor was the validity of segregation before the Court in the case of *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 in which the petitioner was refused admission to the University of Missouri Law School, a State-supported institution, solely because he was a Negro. The State, having

no law school for Negroes, sought to fulfill its obligation to provide equal educational facilities by paying the petitioner's tuition for a legal education in another State. This the Court held did not satisfy the constitutional requirement. It said that the petitioner was entitled to be admitted to the University of Missouri Law School in the absence of other and proper provision for his legal training within the State of Missouri.

Again, the issue was not segregation, but whether an otherwise qualified Negro applicant for law training could be excluded from the only State supported law school. This Court assumed that the validity of equal facilities in racially separate schools was settled by earlier decisions and cited the *Plessy* case and *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, both of which involved segregation only in public carriers, and the *Gong Lum* case. But the validity of a state requirement of segregation was not decided.

The most recent consideration of this problem was in 1948 in the University of Oklahoma Law School case, *Sipuel* v. *Board of Regents of the University of Oklahoma*, 332 U. S. 631. This Court, in a per curiam decision, said that the State must provide law school facilities for the Negro petitioner "in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group" (at 633). The facts in the *Sipuel* case were similar to those in the *Gaines* case, in that no law school facilities were afforded Negroes by the State of Oklahoma.

Segregation was not at issue in the *Sipuel* case. This Court stated in *Fisher* v. *Hurst*, 333 U. S. 147, 150, that:

> The petition for certiorari in Sipuel v. University of Oklahoma did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On submission, we were clear it was not an issue here.

In no case previously before this Court in which racial separation in education has been the subject of comment in an opinion has there been a record presented upon which the Court felt compelled to take cognizance of the issue of segregation *per se* in State supported educational institutions.

The record in this case presents the issue squarely:

Does segregation in State supported educational institutions meet the requirements of the "equal protection" clause of the Fourteenth Amendment?

POINT II

Racial segregation in public educational institutions is an arbitrary and inadmissible classification under the equal protection clause of the Fourteenth Amendment.

In determining whether a particular legislative classification meets the requirements of the "equal protection" clause of the Fourteenth Amendment, this Court has applied two tests: first, whether the classification statute has a constitutionally permissible objective, and, second, whether the classification scheme is based upon differences between the groups classified which bear a substantial relation to an objective of the legislation.

Before this Court would invalidate legislative classification it has been necessary to show a lack of any possible grounds for belief in the ability of the statute to attain desired and legitimate ends. This rule was applied in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79, in the following terms:

> • • • one who assails the classification • • • must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Moreover, the presumption of constitutionality and the rational basis test which have been applied to classification statutes have been decisive to the degree that the Court has refused to invalidate such statutes unless there was a clear showing that the legislature was "manifestly wrong" in its action. See *Ohio ex rel. Clarke* v. *Deckenbach*, 274 U. S. 392, 397; *Patsone* v. *Penna.*, 232 U. S. 138, 144.

While these tests have always been, and are operative as to other legislative classifications, the history of the Court's rulings involving the constitutional validity of governmental action based upon racial distinctions reveals that as to cases concerned with racial discrimination and other civil rights and liberties, the above presumptions are generally not applied. *Thomas* v. *Collins*, 323 U. S. 516.

The propriety of classification on the basis of race has been the subject of separate and special vigilance. The Court has increasingly in recent years made searching inquiry into the sufficiency of any grounds asserted as justification for governmental distinctions based on race or color. It has stated that "all legislative restrictions which curtail the civil rights of a single race group are immediately suspect." *Korematsu* v. *U. S.*, 323 U. S. 214, 216. "Only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause." *Oyama* v. *California*, 332 U. S. 633, 646. This Court has recognized that, as a general rule,

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Hirabayashi* v. *U. S.*, 320 U. S. 81, 100.

In the application of these principles, the Court has consistently declared governmental classification based on race or color to be constitutionally invalid.

This Court has struck down governmental action of a discriminatory character relating to the exclusion of Negroes from grand and petit juries. *Strauder* v. *West Virginia*, 100 U. S. 303; *Hill* v. *Texas*, 316 U. S. 400; it has ruled that the right to qualify as a voter, even in primaries, may not be subject to racial classification. "It is too clear for extended argument," said this Court, "that color cannot be made the basis of a statutory classification affecting the right set up in this case" *Nixon* v. *Herndon*, 273 U. S. 536, 541. In a more recent decision, this Court has held that the exclusion of Negroes from voting in a primary election by a political party constituted a denial by the State of the right to vote. *Smith* v. *Allwright*, 321 U. S. 649. This Court has also struck down laws which in their administration have been revealed as a racial classification resulting in the denial to persons of a particular race or color the right to carry on a business or calling, *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410.

This Court has protected the right to acquire, use and dispose of real property from infringement by State action effecting race classification. In *Buchanan* v. *Warley*, 245 U. S. 60, which involved a racial residential zoning ordinance, the State invoked its authority to pass laws in the exercise of its police power, and urged that this compulsory separation of the races in habitation be sustained because it would "promote the public peace by preventing race conflicts" (at 81). This Court rejected that contention, saying:

> The authority of the state to pass laws in the exercise of the police power • • • is very broad • • • [and] the exercise of this power is not to be interfered with by the courts where it is within the scope

> of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power * * * cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution * * *. (at 74).

The Court rejected the consideration of the police power of the State, however legitimate the exercise of it, to justify a racial classification where rights created or protected by the Constitution were involved.

In a more recent case, *Shelley* v. *Kraemer*, 334 U. S. 1, this Court, by unanimous decision, held that the enforcement of racial restrictive covenants by State courts is State action, prohibited by the equal protection clause of the Fourteenth Amendment. In the course of its decision, the Court measurably strengthened the equal protection clause as a formidable barrier to restrictions having the effect of racial segregation. The contention was there pressed that since the State courts stand ready to enforce racial covenants excluding white persons from occupancy or ownership, enforcement of covenants excluding Negroes is not a denial of equal protection. This Court rejected the equality of application argument, decisively dismissing it in the following language:

> This contention does not bear scrutiny. * * * The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. (at 21, 22).

There has been but one recent deviation from this trend in civil rights cases. This Court has stated that "in the crisis of war and of threatened invasion" when the national safety is imperilled, it will permit a racial classification by the Federal government. In *Hirabayashi* v. *U. S., supra,* which involved a prosecution for failure to obey a curfew order directed against citizens of Japanese ancestry, and in *Korematsu* v. *U. S., supra,* where a governmental order directing the exclusion of all persons of Japanese ancestry from the West Coast military area was contested, the Court recognized an overriding pressing public urgency in time of war. In doing so it made clear, however, that this was an extraordinary exception. "Legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. * * * We may assume", continued the Court, "that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion" has made necessary this racial classification, which "is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant." *Hirabayashi* v. *U. S., supra,* at 100, 101.

State laws providing for racial segregation in public educational facilities are clearly not accompanied by any "pressing public necessity". Rather, there is a pressing public necessity to give all American citizens their due equality of opportunity to utilize educational facilities established by the state for its inhabitants. The denial of such equality of opportunity serves only to create public unrest and disillusionment on the part of those denied in the strength and honesty of our democratic system of government. It serves also to weaken our efforts to preserve peace and extend democracy abroad by exposing our government's earnest efforts in this direction to a charge of hypocrisy.

It is argued by those who seek to justify racial segregation that this Court's declaration against the constitutionality of State statutes requiring racial segregation would serve to touch off an explosion in some parts of our country. But among those who raise this bogey are many who do so for ulterior reasons, seeking to protect special privileges which they have seized as members of the favored racial group. Further, where segregation has been voluntarily abandoned in State-provided higher education as in Arkansas and Kentucky, the dire results predicted have failed to come to pass. And even if disorder does result, such disorder cannot justify the failure of the State to protect the constitutional rights of all of its citizens. *Terminiello* v. *City of Chicago*, 337 U. S. 1.

It is noteworthy that since the termination of the war our federal courts have gone out of their way to condemn the action of the Army in ousting persons of Japanese ancestry from the West Coast military area solely on the basis of their national origin. *Acheson* v. *Murakami*, 176 F. (2d) 953.

POINT III

The "separate but equal" doctrine originated by this Court in *Plessy* v. *Ferguson* had no basis in then-existing legal precedent, and is an anachronism in the light of present-day legal and sociological knowledge.

Apart from the wartime "national peril" decisions, which are clearly inapplicable here, only one unfavorable precedent exists. This is *Plessy* v. *Ferguson*, which enunciated the "separate but equal" doctrine in 1896. This doctrine maintains that facilities can be constitutionally separate, or segregated, provided there is physical equality.

We have already pointed out that the *Plessy* case, involving railroad transportation, does not apply to questions of public education. But, assuming *arguendo* that *Plessy*

could apply, we submit that the *Plessy* case originally had no basis in legal precedent, and moreover is an anachronism in the light of present-day legal and sociological knowledge. The more recent decisions of this Court affecting racial classification have effectively undermined its authority. In consequence, the *Plessy* case is no longer good law, and is not controlling on the question of the constitutional validity of racial segregation.

Plessy v. *Ferguson* held that a Louisiana "separate-coach" statute requiring "equal accommodations for white and Negro passengers" did not violate the command of the Fourteenth Amendment that no State shall deny to any person the equal protection of the laws, because of race or color.

In the *Plessy* decision, three cases were cited as authority for the constitutionality of statutes requiring separation of the two races in "schools, theatres, and railway carriers." None were in point. *Hall* v. *DeCuir*, 95 U. S. 485, was concerned solely with the question of whether a State statute prohibiting segregation was in violation of the Interstate Commerce Clause of the Federal Constitution, and did not deal with the interpretation of the Fourteenth Amendment or its safeguards. The *Civil Rights Cases*, 109 U. S. 3, invalidated the Federal Civil Rights Act of March 1, 1875 on the sole basis that Congress had no authority to pass legislation under the Fourteenth Amendment, which was directed against discrimination by private persons rather than by State action. Finally, *Louisville, New Orleans, and Texas Ry. Co.* v. *Mississippi*, 133 U. S. 587, was another case concerned solely with the effect of the Interstate Commerce Clause on State legislation. It held that a State segregation statute in terms applicable only to intrastate transportation did not unduly burden interstate commerce.

The majority in the *Plessy* case (p. 548) claimed that "statutes for the separation of the two races upon public

conveyances" were held to be constitutional in twelve named cases. An examination of these cases does not support the Court's statement.

The first two cases cited by the Court, *West Chester etc. Ry.* v. *Miles*, 55 Penn St. 209, and *Day* v. *Owens*, 5 Mich. 520, were pre-Civil War decisions, and hence could have set no precedent on the question. The *West Chester* case was a Pennsylvania common law action, which turned upon the reasonableness of segregation under a regulation of the carrier. The majority rested its conclusion on "the law of races, established by the Creator Himself."

Chicago & N. W. Ry. Co. v. *Williams*, 55 Ill. 185, and *Chesapeake, O. & S. Ry. Co.* v. *Wells*, 85 Tenn. 613, although decided after the Fourteenth Amendment was passed, do not contain any discussion of the impact of that Amendment on the question. The Illinois court in the first case merely termed the discrimination unlawful, and awarded damages. In the *Chesapeake* case, the Tennessee court, in a one-paragraph opinion, held that the Railway had acted reasonably under a State statute, and dismissed the complaint. Similarly, in *Houck* v. *Southern Pac. Ry. Co.*, 38 Fed. Rep. 226, the court discussed the facts, and summarily awarded damages without even considering the Fourteenth Amendment.

In *The Sue*, 22 Fed. Rep. 483, *Logwood etc.* v. *Memphis etc. Ry. Co.*, 23 Fed. Rep. 483, and *McGuinn* v. *Forbes*, 37 Fed. Rep. 639, there were involved only discussions of common law principles and private regulations; not of State statutes. *The Sue* was an action in Admiralty, involving transportation facilities employed in public navigable waters between points in Maryland and Virginia. The court held that only the federal government could legislate in this field, but since it had failed to do so, the owners of the boat could adopt such reasonable regulations

as the common law allowed. One of the restrictions imposed by the common law was that "accommodations equal in comfort and safety must be afforded to all alike who pay the same price." Therefore the court's holding that the accommodations offered to the plaintiff, a Negro passenger, were unequal, and its award of damages, was based on an interpretation of common law, not of a State statute.

Logwood etc. v. *Memphis etc. Ry. Co.*, involved intrastate railway transportation. The court simply charged the jury to adopt the rule of *The Sue* as proper law. *McGuinn v. Forbes* was another action in Admiralty involving a steamer travelling between Maryland and Virginia. The holding in the case was that the plaintiff's proof was insufficient to entitle him to a verdict. Again, *The Sue* was cited, and no constitutional issue was raised.

People v. *King*, 110 N. Y. 418, involved a conviction under the New York Penal Code provision *forbidding* discrimination at amusement parks. The provision was sustained against constitutional objection as a valid exercise of the police power, in light of "the War Amendments." Thus this case in no way supports the proposition for which it was cited by the majority. It is interesting to note that Justice Peckham, one of the majority in the *Plessy* case, was on the New York Bench at this time, and dissented without opinion in the *King* case.

The last two cases cited as authority in the *Plessy* majority opinion were Interstate Commerce Commission decisions, and involved the same facts and parties. *Heard* v. *Georgia Ry. Co.*, 1 ICCR 428, was a holding that Section 3 of the Interstate Commerce Act *had* been violated by the discriminatory practices of the defendant. No State statute, and hence no constitutional discussion was involved. *Heard* v. *Georgia Ry. Co.*, 3 ICCR 111, merely reenforced the

prior holding. See, Edward F. Waite, *The Negro in the Supreme Court*, 30 Minn. Law Review 219, 248-251 (March, 1946).

Additional lines of cases cited by the majority in the *Plessy* case involved the existence of "separate schools for white and colored children, which has been held to be a valid exercise of the legislative power * * *" (p. 544), and "Laws forbidding the intermarriage of the two races" (p. 545). There is serious doubt of the validity of laws forbidding the intermarriage of races. The only Supreme Court decision on the subject was *Pace* v. *Alabama*, 106 U. S. 583, which is readily distinguishable as involving an indictment for the crime of "adultery or fornication" between persons of different races; where the statute containing this provision had a lesser punishment for the same crime between persons of the same race. The most recent decision on this subject was a very carefully reasoned one by the highest court of the State of California, which invalidated an anti-miscegenation law as in violation of the Fourteenth Amendment, *Perez* v. *Sharp*, 32 Calif. (2d) 711.

Although many cases have cited the "separate but equal" doctrine of the *Plessy* case, it has never since been reexamined and affirmed by the Court.

The first time the Supreme Court cited the "Plessy doctrine" was in *Atchison, Topeka etc. Ry.* v. *Mathews*, 174 U. S. 96, 105. The holding therein was that the *Plessy* decision did not forbid the imposition of "unequal burdens" on specified corporations; and that the State legislature could validly allow the plaintiff in a suit against the railroads for damages caused by fire, to obtain attorney's fees. Racial discrimination or segregation statutes were not involved in the case.

In *Chesapeake & Ohio Ry.* v. *Kentucky*, 179 U. S. 388, 392, the Court was concerned solely with the application of the Interstate Commerce clause. A Kentucky "separate

coach statute" was construed to apply solely to passengers both embarking and departing from depots within the State; the Court then saying, "and so construing it, there can be no doubt as to its constitutionality. *Plessy* v. *Ferguson.*" Similarly, the *Roanoke*, 189 U. S. 185, 198, dealt primarily with the Interstate Commerce issue. Therein it was held that Congress, and not the states, could legislate regarding certain navigable waterways. The Court distinguished *Plessy* as involving State law "requiring separate carriages for the white and colored races [which] were sustained upon the ground that they applied only between places in the same state." Hence, neither of these decisions in any way validated that part of the majority decision in the *Plessy* case which purported to interpret the Fourteenth Amendment.

Clyatt v. *U. S.*, 197 U. S. 207, 218, cited the *Plessy* case solely to uphold Congressional legislation punishing "the arrest of any person in the Territory of New Mexico to a condition of involuntary servitude" against attack on the grounds that it fell outside the scope of the Thirteenth Amendment. The Court quoted the statement that "this [the Thirteenth] Amendment was said in the Slaughter House Cases to have been primarily intended to abolish slavery * * * but that it equally forbade Mexican peonage or the Chinese coolie trade when they amounted to slavery or involuntary servitude, and that the use of the word 'servitude' was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name." It was not at all concerned with the Fourteenth Amendment.

The Court in *Chiles* v. *Chesapeake & O. Ry. Co.*, 218 U. S. 71, 77, emphasized the fact that it was dealing with "the act of a private person, to wit, the Railway Co. * * * and we must keep in mind that we are not dealing with the law of a state." The Court thus escaped facing the issue of the Interstate Commerce Clause, as well as the

issue of the Fourteenth Amendment as applied to railroads. On page 77 it quoted from the *Plessy* language the phrase "the established usages, customs and traditions of the people" solely as a "test of reasonableness of the regulations of a carrier."

McCabe v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 160, involved the constitutionality of a clause in the Oklahoma "separate-coach statute" which provided that "the provision requiring equal accommodations (earlier in the statute) should not be construed to prevent railway companies from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately or jointly." The defense maintained that the Oklahoma legislature could take note of the fact that the number of Negroes requiring such service did not justify the use of separate facilities in such cars.

The actual holding in the *McCabe* case was that the petitioner failed to show sufficient standing to obtain injunctive relief. However, in addition, the Court rejected the defense argument, saying that it "makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one." By way of further dictum, on page 160, the Court noted that "there was no reason to doubt" the lower court's finding that "it has been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a state to require separate, but equal, accommodations for the two races, *Plessy* v. *Ferguson*." This dictum was not only unnecessary for the decision in the case, but was irrelevant to the constitutional issue, in that by finding a lack of equality, the Court held that the "separate but equal" doctrine spelled out by the majority in the *Plessy* case was inapplicable. Hence there was no need for the Court to re-examine it.

Butler v. *Perry, Sheriff of Columbia County, Fla.*, 240 U. S. 328, 333, was another case which cited the *Plessy* case in connection with the Thirteenth Amendment. The issue involved was the constitutionality of a Florida statute providing that all able bodied men residing in Columbia County would be subject to call to work on the public roads in the county. On page 333 the Court quoted the *Plessy* decision to show that the Thirteenth Amendment was designed "to cover those forms of compulsory labor akin to African slavery, * * * and certainly was not intended to interdict enforcement of those duties which individuals owe to the state."

The case of *Buchanan* v. *Warley*, 245 U. S. 60, 79, *supra*, which cites the *Plessy* opinion, is indicative of the tendency of judicial sentiment to depart from the "separate but equal" doctrine. In that case, the plaintiff, a white landowner, contracted to sell a plot of land to the defendant, a Negro. The defendant refused to pay on the grounds that a city ordinance of Louisville, which prohibited colored persons from occupying houses in a block where the greater number of houses were occupied by whites, made performance of the contract impossible. In holding that this ordinance was in violation of the Fourteenth Amendment; the Court distinguished the *Plessy* case on the ground that in that case a "classification of accommodations was permitted upon the basis of equality for both races." However, the Court did not state that there was inequality in the case before it, but chose to rest its decision on broader grounds. On page 81 the Court said "But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution, such legislation [as upheld in the *Plessy* case] must have its limitation, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us." And again, on

page 76, that "the chief inducement to the passage of the [Fourteenth] Amendment was the desire to extend federal protection to the recently emancipated race from unfriendly and discriminating legislation by the States."

In *Gong Lum* v. *Rice*, 275 U. S. 78, 86, this Court held that a child of Chinese blood, born in, and a citizen of, the United States, is not denied the equal protection of the laws by being classed by a State among the colored races who are assigned to public schools separate from those provided for the whites, when equal facilities for education are afforded to both classes. The Court was concerned primarily with the problem of construing the *Plessy* doctrine to cover the facts of the case. It relied upon the authority of the old State decisions cited in the *Plessy* case.

Bryant v. *Zimmerman*, 278 U. S. 63, 70, involved a proceeding in habeas corpus in a State court where the detention on a criminal charge was alleged to be in violation of the United States Constitution. This Court cited the *Plessy* case as a holding that such a proceeding is a "suit" within the meaning of the jurisdictional statute, and that an order of the State court of last resort, refusing to discharge the prisoner, is a final judgment in that action, and is, therefore, subject to review. That case, of course, was in no way related to the Fourteenth Amendment.

Similarly, in *Colgate* v. *Harvey*, 296 U. S. 404, 446, the dissenting opinion cited the *Plessy* case only to show the reluctance of the Supreme Court to extend the coverage of the "privileges and immunities" clause of the Fourteenth Amendment.

In *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 344, the Court, although talking the language of the *Gong Lum* and *Plessy* cases, found that there was "unequal"

legal instruction afforded in Missouri, and hence did not find it necessary to re-examine the old decisions.

Thus it appears that this Court has never directly affirmed or re-examined the decision in *Plessy* v. *Ferguson*, and that to overrule it now would not result in the overthrow of a well-established line of legal precedents.

Justification for the legislative classification in the *Plessy* case was that it was a valid exercise of the police power of the State, and that it was not discriminatory because it applied equally to both races. As to the exercise of police power, the Court said, at 544,

> Laws permitting, and even requiring, their separation in places where they are likely to be brought into contact * * * have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

This Court has since refused to recognize the police power of the State as a justification for racial legislation. *Buchanan* v. *Warley*, *supra*, is a complete answer (p. 74):

> The police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution.

The principal ground of decision in the *Plessy* case, that there is no discrimination where the separate facilities furnished to both races are on an equal basis, is open to attack on several counts.

In the first place, the *Plessy* case *assumed* that segregated facilities can be equal. As we have shown, the Court has since the *Plessy* case rejected the claim that there is any presumption of constitutionality attaching to such a statute. Rather, it has said that racial classification laws must be viewed with great suspicion and bear

the closest scrutiny. They must overcome the strong inference of unconstitutionality. The Court would not today accept the factual assumption of the *Plessy* case without a showing that it rests upon a reasonable basis.

Second, the fact of discriminatory application of "separate but equal" in the field of education is a knowledge so common and universal, that the Court cannot but dismiss as unfounded the assumption of *Plessy*, and take judicial notice that racial segregation in education, wherever applied, is administered with an unequal hand and is unequal in result.

In Washington, D. C., our national capital, these facts have been demonstrated recently by a survey of the segregated school system in effect there. The survey was conducted pursuant to a request by Congress by a "person qualified by training and experience in the field of public-school education" (62 Stat. 542). Professor George D. Strayer of Columbia University was assisted by a staff of 22 specialists in his study. The findings of the survey are embodied in a report submitted to Congress, *Report of a Survey of the Public Schools of the District of Columbia Conducted Under the Auspices of the Chairmen of the Subcommittees on District of Columbia Appropriations of the Respective Appropriations Committees of the Senate and House of Representatives.* Washington, Government Printing Office, 1949. The facts contained in this report demonstrate beyond doubt the inequality of the white and colored public school systems of the District of Columbia. If efforts to achieve a "separate but equal" segregated school system have failed in our nation's capital where it is subject to the control of our national Congress, can it possibly succeed in those areas where a system of caste and race privilege is deeply intrenched?

Third, the expenditure by a State of its educational funds for racially segregated schooling will necessarily result in inferior quality and quantity of schooling for

both races, than if the same funds are spent for segregated education. "Separate but equal" in education results in an inferiority of facilities for both races.

Legislative classification in educational facilities on the basis of race or color must therefore fall, as constitutionally invalid, as an arbitrary and inadmissible classification under the "equal protection" clause. The racial distinction is "irrelevant and therefore prohibited." It is based upon factors which reflect concepts of racial superiority and inferiority and is thus rendered irrational as a justification under the Constitution. The decision of the major case supporting it was erroneous when originally decided, and has since been implicitly repudiated numerous times by this Court. A final and open repudiation is in order.

POINT IV

Segregation necessarily imports discrimination and therefore violates the requirements of the Fourteenth Amendment.

The State of Texas, by constitutional provision (Art. VII, Sec. 7) and statutory enactment (Revised Civil Statutes, Title 49; Chap. 19, Art. 2900) stipulates that separate schools be provided for white and colored students, "and impartial provision shall be made for both races."

The contention is raised that, since the State law insures physical equality of treatment within a segregated system, no violation of the equal protection of the laws is involved. Where a specific instance of inequality is proven, the remedy should be merely to "equalize",—either by improving the educational facilities for Negroes, or by worsening those for whites to the level provided for Negroes.

This reasoning does not have even a superficial appearance of validity. Inherent therein are the erroneous as-

sumptions that the State may, by virtue of its police power, establish racial classifications, and that there are differences between the two races which warrant making such classification. These contentions are dealt with elsewhere in this brief.

What we are concerned with here is the false assumption that, in the segregation of the races in educational facilities, there *can* be attained the equality of treatment which the Fourteenth Amendment requires. It is our contention that educational facilities for Negroes in segregated areas have never been equal and could not possibly achieve an equality which would satisfy the dictate of the "equal protection" clause of the Fourteenth Amendment.

In *Oyama* v. *California*, 332 U. S. 633, 636, Chief Justice Vinson made it clear that this Court may take cognizance of actual conditions and deal with realities. He said:

> In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are co-mingled.

(1) Equality is in fact impossible in racially segregated public educational facilities.

Wherever racial segregation in education has been required by the State, the physical educational facilities afforded Negroes have been substantially and uniformly inferior and unequal to those enjoyed by whites.

The disparity in physical facilities has been so great and so universally a concomitant of the segregated system that it need hardly be pressed here by extensive documentation.

Expert testimony in the record shows that the State of Texas regularly spends substantially less for Negro than for white education. The total assets of white institutions of higher learning amount to $28.66 for each white person in the State, but the assets of Negro schools amount to only $6.40 per Negro. The whites have almost four and one-half times as much in total educational institutional assets per capita of the population as do the Negroes (R. 244).

In 1943-44, a typical year, Texas appropriated approximately $11,000,000 in State, county and district funds for higher education. Of this amount, about $10,800,000 went to white institutions, or $1.98 per capita of white populations; the balance went to Negro institutions, or the equivalent of 23¢ per capita of Negro population in the State. On this basis, white institutions of higher learning received eight times as much as Negro institutions (R. 246).

The inequality in physical facilities is even far more pervasive than the statistics on appropriations for education by the State indicate. The testimony in the trial court showed that the State of Texas provided a law school for the petitioner by leasing a suite of three rooms and toilet facilities in an office building, after the commencement of the action, for a period beginning March 1, 1947, and ending August 31st of that same year (R. 29, 41), in the semi-basement of the building (R. 88). One room was to be an office and reading room and the other two were intended as classrooms. There was no private office or faculty room for any instructor, for administrative personnel or for a dean (R. 47). Nor was there space for a library consistent with even the minimum needs of a law school. Some 200 text books were available on the premises to serve as a library (R. 21). There was no librarian (R. 96).

There was no provision for scholarships, prizes, participation in the production for the Texas Law Review, participation in the legal aid clinic, or opportunity to join

any honorary law society, such as the Order of the Coif, all of which were features of the School of Law of the University of Texas and consequently available only to white students (R. 103-105).

The faculty of the "school" offered to the petitioner consisted of three instructors assigned part-time from the University of Texas Law School (R. 92-93). Admittedly, the school established for the petitioner did not meet the requirements set by the Association of the American Law Schools for accreditation (R. 92).

The State of Texas contends that this racially segregated law school affords facilities equal to those enjoyed by white students at the University of Texas Law School. But it is quite obvious that the Negro law school cannot possibly afford even a minimal legal education. To claim that it is "equal" to the University of Texas Law School is sheer hypocrisy.

The treatment afforded Mr. Sweatt by the State of Texas is by no means a unique example of the treatment accorded Negroes in educational institutions of the South under the guise of equality of segregated facilities. In every instance of segregation in practice there are provided for Negro citizens fewer educational opportunities, and educational opportunities of poorer quality than are afforded to white citizens. The deficiencies are systematic and all-pervading.

This is not confined to the level of higher education, nor to the State of Texas. The pattern is the same wherever racially segregated schools exist.

In the generation from 1900 to 1930 the disparity between the provision of public educational facilities for white and Negro children, where separate schools are legally mandatory, has increased at a tremendous rate. "In 1900, the disparity in the per capita expenditures upon the two racial groups was *only* 60 per cent in favor of whites, but in 1930 this disparity had increased to 253 per cent." (Thompson, Chas. H., *Court Action the Only*

Reasonable Alternative to Remedy the Immediate Abuses of the Negro Separate School, 4 J. of Negro Ed. 419 (1935)).

For the ten year period, 1918-1928, $270,500,000 was spent on new school facilities by eight Southern states (including Texas) for white children, and $29,500,000 for Negro children. This is a ratio of 9 to 1 in favor of whites on appropriations, against a population ratio of 2 to 1 in favor of whites. (Newbold, N. C., *Common Schools for Negroes in the South,* The Annals of the Amer. Acad. of Polit. & Soc. Science, Vol. 140, No. 229, P. 209, 218, 219 (Nov. 1928)).

Throughout the South there is a wide discrepancy in per capita expenditure for Negro teachers as compared to that for white. For Texas, in 1936, for every $1. spent for teachers' salaries for white students, only 61¢ was expended for teachers' salaries for Negro students. This ratio was the same as the average for the 17 southern states. By 1945, white teachers' salaries were in excess of Negro by 45%. (Boykin, Leander L., *The Status and Trends of Differentials Between White and Negro Teachers' Salaries in the Southern States, 1906-1946,* 18 J. of Negro Ed. 40 (1949)).

There is also a marked inferiority in library facilities in Negro schools. (Thompson, Chas H., *The Critical Situation in Negro Higher and Professional Education,* 15 J. of Negro Ed. 579, 581, 582 (1946)).

As to length of school term, the Negro is again disadvantaged, and especially so in the rural communities of the South. In a survey made for the United States Office of Education in 1935, it was revealed that "the average number of days schools are kept open for Negroes in 17 southern states is 135, which is approximately 1½ months less than the accepted standard in those states. The cumulative effect of this annual loss to Negroes over one school generation of 12 years means a difference of 18 months—or 2 school years." (Caliver, Ambrose, *A*

ability of Education to Negroes in Rural Communities, 34, Office of Education, Dept. of Interior, Bulletin No. 12 (1935)).

In comparison with the physical facilities available to white students, the segregated Negro student suffers from an inadequacy and inequality resulting from the segregation in every category of educational facility, and by every standard of measurement. See, Phelps-Stokes Fund, *Educational Adaptations:* Report of Ten Years' Work, 1910-1920; Johnson, Chas. S., *The Negro in American Civilization* (1930) 261 et seq.; Embree, Edwin R., *Brown America* (1931); Moton, Robert R., *What the Negro Thinks*, 102-108 (1929); *Survey of Higher Education for Negroes*, 14 et seq., U. S. Office of Ed., Misc. No. 6, Vol. II, U. S. Gov't Print. Off., Wash. D. C. (1942); Woofter, Thomas J. Jr., *The Basis of Racial Adjustment*, 176-185 (1925); *The Availability of Education in the Texas Negro Separate School*, 16 J. of Negro Ed. 429 (1947).

The President's Commission on Higher Education, after thorough examination of the facts, found that:

> * * * the separate and equal principle has nowhere been fully honored. Educational facilities for Negroes in segregated areas are inferior to those provided for whites. Whether one considers enrollment, over-all costs per student, teachers' salaries, transportation facilities, availability of secondary schools, or opportunities for undergraduate and graduate study, the consequences of segregation are always the same, and always adverse to the Negro citizen. (*Higher Education for American Democracy*: Vol. II, Equalizing and Expanding Individual Opportunity 31 (1947).

It might be contended that while educational facilities have been and are, in fact, unequal, equality is nevertheless theoretically possible. There are two answers:

Educational plants, like other physical facilities, deteriorate at varying rates. To maintain physical equality in a segregated educational system, it would be necessary to continually balance the facilities of one system against the other and to take steps to eliminate inequalities which necessarily develop from time to time. This is administratively impossible.

But there is even a more compelling factor which makes physical equality of facilities, without a substantial reduction of facilities now available to whites, a practical impossibility. The financial cost involved is beyond the capacity of the South to bear. Horace Mann Bond, in *Education of the Negro in the American Social Order* (1934) sums this up, at 231:

> If the South had an entirely homogeneous population, it would not be able to maintain schools of high quality for the children unless its states and local communities resorted to heavy, almost crushing rates of taxation. The situation is further complicated by the fact that a dual system is maintained. Considering the expenditures made for Negro schools, it is clear that the plaint frequently made that this dual system *is* a burden is hardly true; but it is also clear that if an honest attempt were made to maintain 'equal, though separate schools', the burden would be impossible even beyond the limitation of existing poverty.

Physical equality can be achieved only when the walls separating the two systems are destroyed and students regardless of race or color, are permitted to use all available educational facilities.

(2) The economic, sociological and psychological consequences of racial segregation in and of themselves constitute a discrimination prohibited by the equal protection clause of the Fourteenth Amendment.

Aside from consideration of equality of physical facilities, segregation involves substantial factors which produce a degree of inequality repugnant to the Constitution.

There are discriminatory factors which are present in the very schooling afforded the Negro, which have no relation to the "equality" or adequacy of physical facilities. Dr. Robert Redfield, an education expert, testified in the trial court, to the fact that segregation in education deprives the Negro of the "opportunity to exchange professional and intellectual matters with members of the other major groups" in the nation (R. 200).

Essential to the educational process is the interplay of contributions from all persons and all groups. Full equality in education is not attainable unless all students, regardless of race, have the fullest opportunity to associate intellectually with each other, to express and receive divergent points of view which arise from their differing social backgrounds.

The development of adequate educational facilities for Negroes is greatly handicapped by their isolation from the white community. This is not to mention the deprivation to the white student of intellectual association with the Negro student. Nor are these mutual deprivations an indication of equality. (*Shelley* v. *Kraemer*, 334 U. S. 1, 22, "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.")

Education for the legal profession, in particular, requires the highest of standards. The study of law traverses many fields of human knowledge. Yet the Negro relegated to a jim-crow law school finds that there is an insufficient number of students to furnish the broad cross-section of intellectual interests and proficiencies

which are essential ingredients of successful law school training.

Law school classes are most stimulating where they afford ample group discussion. It is a difficult task to attempt to study law alone, as the petitioner is being compelled to do. Even were there a large enrollment at the Negro law school, the facilities for discussion among students would be limited and the Negro student deprived of needed intellectual challenges from white fellow students.

In addition to this, the segregated Negro is deprived of the opportunity of participating with white students in production of their law review, in moot courts and mock trials, in such practice as is afforded by legal aid clinics and public defender societies and in all of the activities outside of the classroom which go to make up a rounded legal education.

Furthermore, the Negro lacks the prestige which comes from being a graduate from accredited and well-known educational institutions. This prestige carries through in later life, especially in professional life, and has a substantial pecuniary value. It is common knowledge that in the eyes of the community, the Negro school has substantially less professional standing than has the "equivalent" white school.

But over and above these considerations, the very existence of segregation is a degrading and humiliating racial discrimination against the Negro, with all its resultant evil effects.

The stamp of inferiority implicit in the segregation is conclusively established in the *mores* of the communities where racial separation is practiced. There is no denying the fact that in those communities the attendance of a white person at a Negro school, or his being seated in the Negro section of a transportation facility (even if the physical equal of any) is not only illegal, but con-

sidered to be degrading and a loss of caste. To ignore this is to ignore the history of community relations in this country.

Moreover, the basic factual assumption upon which the rule in the *Plessy* case was predicated over half a century ago,—that a constitutional degree of equality is possible in racial segregation, is, in the light of modern sociological and psychological data demonstrably false, and was, at all times, utterly without foundation. What the Court then maintained as a fallacious assumption, "that the enforced separation of the two races stamps the colored race with a badge of inferiority" (at 551) is today an uncontroverted scientific fact. Moton, Robert R., *What the Negro Thinks* 99 (1929); Bond, Horace M., *Education of the Negro in the American Social Order* 385 (1934); Gallagher, B. G., *American Caste and the Negro College* (1938); Davis, A. and Dollard, J., *Children of Bondage* (1940).

The consequences of the status of inferiority manifest themselves not only in economic limitations and in social impediments, but also in mental and emotional disturbances and shortcomings in proper personality development. These are discernable and measurable by the social scientist, and are matters of substance and sufficiently material to be given recognition as within the scope and intendment of the "equal protection of the laws" clause of the Fourteenth Amendment.

An excellent and authoritative Note published recently in the *Yale Law Journal* has pointed out that:

> The effects of a dual school system force a sense of limitations upon the child and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy and discourage racial self-appreciation. These abnormal results, condoned by the implications of the *Plessy* case, deny to the Negro and Mexican child "equal protection of the laws' in every meaningful sense of the words.

Segregation in Public Schools—A Violation of "Equal Protection of the Laws", 56 Yale L. J. 1059, 1062 (1947), and authorities therein cited: Long, *Some Psychogenic Hazards of Segregated Education of Negroes*, 4 J. of Negro Ed. 336, 343 (1935); Long, *The Intelligence of Colored Elementary Pupils in Washington, D. C.*, 3 J. of Negro Ed. 205-22 (1934); Gallagher, *American Caste and the Negro College*, 109, 184, 321, 322 (1938).

The offer of equality in physical facilities cannot affect these pernicious factors inherent in segregation. The economic, sociological and psychological consequences to the Negro of segregation of the races, where it is practiced, are actually far more substantially discriminatory than any inequality in physical facilities can ever be. Realistically, the unconstitutional discrimination consists of the inequalities which flow from enforced segregation, rather than the inequality of mere physical facilities.

Conclusion

Racial segregation in our country is a threat to our leadership in international affairs. We have subscribed to international agreements and resolutions which are contradicted by our practices. A continuation of segregation gives the lie to our democratic protestations at a time when our leadership in world affairs is challenged.

Finally, unless racial segregation in education is declared unconstitutional now, we may expect a further crystallization of patterns of discrimination, inasmuch as governors of eleven Southern States are planning to implement a regional compact which will provide higher education for Negroes on a segregated basis.

For the reasons urged herein we respectfully request that the judgment of the Court below be reversed.

Respectfully submitted,

MARCUS COHN,
Washington, D. C.,

JACOB GRUMET,
New York City,

Attorneys for
American Jewish Committee,
B'nai B'rith (Anti-Defamation League).

SOL RABKIN,
JACOB SCHAUM,

of Counsel.

Dated New York, N. Y., March 31, 1950.

APPENDIX

American Jewish Committee

The American Jewish Committee is a corporation created by an Act of the Legislature of the State of New York in 1906. Its charter states:

> The object of this corporation shall be to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto * * *

During the forty-three years of our existence it has been one of the fundamental tenets of our organization that the welfare and security of Jews in America depend upon the preservation of constitutional guarantees. An invasion of the civil rights of any group is a threat to the safety of all groups.

For this reason we have on many occasions fought in defense of civil liberties even though Jewish interests did not appear to be specifically involved. The present case, involving segregation in state-supported educational institutions, is one with which we are deeply concerned because such discrimination deprives millions of persons of rights that are freely enjoyed by others and adversely affects the entire democratic structure of our society. A question of transcendent public importance is thus presented to this Court.

B'nai B'rith (Anti-Defamation League)

B'nai B'rith, founded in 1843, is the oldest civic organization of American Jews. It represents a membership of 300,000 men and women and their families. The Anti-Defamation League was organized in 1913, as a section of the parent organization, in order to cope with racial and religious prejudice in the United States. The program developed by the League is designed to achieve the following objectives: to eliminate and counteract defamation and discrimination against the various racial, religious and ethnic groups which comprise our American people; to counteract un-American and anti-democratic activity; to advance goodwill and mutual understanding among American groups; and to encourage and translate into greater effectiveness the ideals of American democracy.

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Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 44.

HEMAN MARION SWEATT, PETITIONER,

v.

THEOPHILUS SHICKEL PAINTER ET AL.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

SUPPLEMENT TO BRIEF OF AMICI CURIAE.

THOMAS I. EMERSON,
JOHN P. FRANK,
ALEXANDER H. FREY,
ERWIN N. GRISWOLD,
ROBERT HALE,
HAROLD HAVIGHURST,
EDWARD LEVI,
For the Committee of Law Teachers Against Segregation in Legal Education.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 44.

HEMAN MARION SWEATT, PETITIONER,

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THEOPHILUS SHICKEL PAINTER ET AL.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

SUPPLEMENT TO BRIEF OF AMICI CURIAE.

The brief filed by the state of Texas includes the following passage (Br. 121; see also Appendix 227):

> "The school, including of course its faculty, has also been found by the American Association of Law Schools to meet its standards. Its accreditation was delayed pending outcome of this law suit and for that reason only."

This statement is not correct.

In order that the Court may have available all of the facts with respect to this matter, there is set forth in an Appendix to this memorandum the complete transcript of the proceedings of the Association of American Law Schools, held in Chicago, Illinois, on December 29, 1949, relating to this issue.

From that transcript it appears that the Association "took the issue or the problem off our calendar," and that the president of the Association expressly stated: "I do not understand that this body approves or disapproves at this stage anything that the Executive Committee has done."

Respectfully submitted,

THOMAS I. EMERSON,
JOHN P. FRANK,
ALEXANDER H. FREY,
ERWIN N. GRISWOLD,
ROBERT HALE,
HAROLD HAVIGHURST,
EDWARD LEVI,

For the Committee of Law Teachers Against Segregation in Legal Education.

April, 1950.

Appendix.

Extract from minutes of annual meeting of Association of American Law Schools held in Chicago, Illinois, on December 29, 1949.

SECRETARY-TREASURER RIBBLE: I turn to the supplementary report of the Executive Committee. I had best start this report by reading a brief section of our Articles of Association.

> Section 2.2. Applications for Membership.
>
> Applications for membership shall be addressed to the Secretary, accompanied by evidence that the applicant complies with the requirements and standards established by the Association. The Executive Committee shall examine the application and report to the Annual Meeting of the Association whether or not the applicant has qualified.

In accord with that obligation, the Executive Committee reports as follows: The School of Law of Texas State University for Negroes applied for admission. The committee has investigated its qualifications and finds that the school complies with our requirements and standards at this time. In view, however, of the pendency in the Supreme Court of a case which may well reexamine the validity of the constitutional test for such an institution as hitherto understood, the committee and the school have agreed that action on the application be deferred.

I move the report be received and filed.

PRESIDENT DICKINSON: Without objection, it will be so ordered.

* * * * * * * * *

MR. ERWIN NATHANIEL GRISWOLD [Harvard University Law School]: I would like to ask for a ruling or interpretation from the Chair as to an action which was taken a moment ago with respect to the report of the Executive Committee.

Did the action taken, which I understand was to receive the report and place it on file, involve in any way approval by this Association of the determination made by the Executive Committee?

PRESIDENT DICKINSON: I do not so understand it. I understand that the Executive Committee is simply reporting a disposition by agreement among all parties concerned which took the issue or the problem off our calendar.

We are telling you in that statement the circumstances in which that was done. I do not understand that this body approves or disapproves at this stage anything that the Executive Committee [has done].

MR. GRISWOLD: That is my understanding, and I wanted it to be clear on the record.

PRESIDENT DICKINSON: Well, that is my personal understanding. If the Executive Committee gets together and overrules me, it will be too late to do anything about it, but I think that is correct. [Laughter]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949

NO. 6[illegible]41

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *ET AL.*,

Respondents

On Writ of Certiorari to the Supreme Court of the State of Texas

MOTION AND BRIEF

For the Texas Council of Negro Organizations as *Amicus Curiae*

L. N. D. WELLS, JR.
MARION C. LADWIG
Counsel for Amicus Curiae

MULLINAX, WELLS AND BALL
of Counsel

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Plessy v. Ferguson, 163 US 537	7, 8, 18, 22
Smith v. Allwright, 321 US 649	18
West Coast Hotel v. Parrish, 300 US 379	22

OTHER AUTHORITIES CITED

	PAGE
Allen, J. S., The Negro Question in the United States, New York, 1936	11
The Crisis, Vol. 57, No. 1 ("Southern College Teachers Repudiate Jim Crow")	17
The Daily Texan, Jan. 10, 1950	17
The Dallas Morning News, Feb. 2, 1950	19
13 Federal Register 4311, July 26, 1948	20
Frazier, E. Franklin, The Negro in the United States, Macmillan, New York, 1949	9, 11
Harris and Spero, "Negro Problem," Encyclopaedia of the Social Sciences XI	9, 11
Hoffman, F. L., Race Traits and Tendencies of the American Negro, New York, 1897	11
Journal of Negro Education, Vol. XIX, No. 1, Winter, 1950	16
Key, V. O., Southern Politics, Knopf, New York, 1949	18
Lewinson, Paul, Race, Class and Party, Oxford University Press, 1932	9
Murphy, Problems of the Present South, New York, 1909	11
Myrdal, Gunnar, An American Dilemma, New York, 1944	11
New York Times, September 18, 1949	21
The Oklahoma Daily, Jan. 13, 1948	14

The Oklahoma Daily, Nov. 10, 1949 14

The Oklahoma Daily, Dec. 16, 1949 14

Oklahoma Statute, House Bill No. 405, 1949 13

Page, T. N., The Negro, The Southerners' Problem, New York, 1904 11

The Postal Bulletin, Sept. 20, 1949 ("Procedure relative to fair employment practices") 20

Proceedings, Texas State Federation of Labor, 50th Convention, 1948, Fort Worth, Texas, June 21-June 24 20

San Antonio Register, April 9, 1948 19

Simpkins, B. F., The South, Old and New, Knopf, New York, 1947 ..... 8, 9, 10

The Southern Patriot, New Orleans, La., Vol. 7, No. 8, Oct., 1949 15

Stone, A. H., Studies in the American Race Problem, New York, 1908 11

Strong, D. S., The Rise of Negro Voting in Texas, 1948 Amer. Pol. Sci., Rev. 42 18

Thomas, W. H., The American Negro, New York, 1901 11

Thompson, Charles H., "Separate But Not Equal," Southwest Review, Southern Methodist Univ. Press, Dallas, 1948, Vol. XXXIII, No. 2 ..... 16, 17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949

NO. 667

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *ET AL.*,

Respondents

On Writ of Certiorari to the Supreme Court of the State of Texas

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for and on behalf of the Texas Council of Negro Organizations, respectfully move that this Honorable Court grant them leave to file the accompanying brief as *amicus curiae*. The Texas Council of Negro Organizations is made up of forty-five state-wide organizations, fraternal, political, religious, educational, or

social,[1] and has as its principal purposes "to serve as a clearing house of information and opinion on Negro life and interracial affairs in Texas, to sensitize the Negro people of Texas to the rights and responsibilities of worthy citizenship in a democratic society of free men, and to make authorized representation of social, economic, political and educational issues affecting the well-being of the Negro people of Texas."

Current social and economic data, relevant to this Court's determination of the reasonableness of the classification at issue, is available, and has not been brought to the attention of the Court by either the parties to this cause or other *amici curiae*. In order that such data will be available to the Court, the Texas Council of Negro Organizations respectfully requests leave to file the accompanying brief.

The Council makes this request, believing that the decision by this Court in the case at bar will largely influence the rate of progress which millions of American Negro citizens will make in achieving their aspirations of first-class citizenship through equality of educational opportunity, and being cognizant of the fact that the decision herein will determine the right of members of affiliated organizations and their sons and daughters to attain the educational advantages to which they believe themselves entitled as citizens of the United States.

Consent of the attorney for petitioner to the filing of

[1] A list of the constituent organizations is set forth in Appendix A.

this brief has been obtained.[2] Consent of the attorney for respondent was requested on December 22, 1949, but no reply to such request has as yet been received. We are today submitting copies of this motion and brief to attorney for respondent and renewing our previous request that he consent to the filing. Such consent, when received, will be promptly submitted to the Court. In the event such consent is not received, we respectfully pray that leave to file this brief be granted notwithstanding. Cf U. S. Supreme Court Rule 27, par. 9 (c).

L. N. D. Wells, Jr.

Marion C. Ladwig

Marion C. Ladwig
Counsel for *Amicus Curiae*

MULLINAX, WELLS AND BALL
of Counsel
1716 Jackson Street
Dallas, Texas.
February 17, 1950

STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned authority, on this day appeared L. N. D. Wells, Jr., who being duly sworn, deposed and said that on this 17th day of February, 1950, copies of this motion and the attached brief were served by reg-

istered mail, return receipt requested, upon the Honorable Price Daniel, Attorney General of Texas, Capitol Building, Austin, Texas, counsel for respondent herein, and upon the Honorable Thurgood Marshall, 20 West 40th Street, New York 18, New York, counsel for petitioner.

Susan Gates Morrow

SUSAN GATES MORROW
Notary Public in and for
Dallas County, Texas

---

[2] A copy of petitioner's consent is appended hereto as Appendix B.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949

NO. 667

HEMAN MARION SWEATT,

Petitioner,

vs.

THEOPHILIS SHICKEL PAINTER, *ET AL.*,

Respondents

On Writ of Certiorari to the Supreme Court of the State of Texas

BRIEF FOR THE TEXAS COUNCIL OF NEGRO ORGANIZATIONS *as Amicus Curiae*

OPINIONS BELOW AND JURISDICTION

The opinions below and jurisdictional statements are set out in full in the brief for the petitioner.

STATEMENT OF THE CASE

The petitioner, Heman Marion Sweatt, upon applying for admission to the University of Texas Law School ap-

proximately four years ago, was denied admission solely because of his race (R 445). Sweatt then brought a mandamus action in a State District Court to compel the State University to admit him as a qualified student. This relief was denied in three separate hearings in the District Court, and also by the Texas Court of Civil Appeals, and the Supreme Court of Texas; each of these courts holding that denial of admission to State University graduate schools to Negro citizens was not violative of the Negro citizen's rights to equal protection of the laws nor of his rights under the Fourteenth Amendment to the Constitution of the United States, so long as "separate but substantially equivalent" educational facilities were afforded on a basis of race segregation.

That the Texas Courts erred in holding that the educational facilities offered petitioner were "substantially equivalent" to those afforded non-Negro citizens is plain from this record. Inasmuch as this point is so apparent from the undisputed facts of this case, and is fully briefed by petitioner and by the *amicus curiae,* the American Jewish Committee, we will not burden the Court with a restatement of argument on this point.

We shall limit our argument to the following point:

SUMMARY OF ARGUMENT

The "separate but equal" doctrine of *Plessy v. Ferguson*, 163 US 537, (upholding state racial segregation statutes) now has no justification when applied to public education on the university graduate level, and should be rejected as a violation of the "equal protection" clause of the Fourteenth Amendment to the United States Constitution.

Plessy v. Ferguson, 163 US 537, decided fifty-four years ago, held a state statute requiring segregation of the Negro race to be a reasonable exercise of the state's police power, and justified to preserve the "public peace and good order." That case was erroneously decided in 1896, based on the then prevailing popular and scientific misconception that the Negro race was inferior, and that a commingling of the "superior" white race with the "inferior" Negro race would lead to public disorder. More than fifty years of learning and experience have demonstrated that no reasonable justification exists for classification (at least for purposes of public education at the graduate level) on the basis of race. Racial segregation in the circumstances disclosed by the record in this case has now been proved unnecessary for the maintenance of public peace and good order. Experience in the fields of education, politics, military service, religion, labor and business has demonstrated that racial segregation in graduate public education is not necessary or justified to preserve the public welfare.

ARGUMENT

When, in 1896, this Court held in *Plessy v. Ferguson* that a state statute requiring segregation of Negro citizens did not transgress constitutional limitations, the decision was placed on the sole ground that racial segregation was justified to preserve the public peace and good order. Even in that day, and in that very case, it was recognized that:

> ". . . every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." (163 US 537 at 550.)

The Supreme Court of 1896, laboring under the social pressures of irrational race prejudice too commonly accepted by the public at that time, and misled by the "scientific" misconceptions of such distinguished scholars as Charles Darwin, Francis Galton, Thomas Carlyle, and Cesare Lombroso, all of whom affirmed the doctrine of Negro inferiority,[1] held it to be a reasonable exercise of the states' police power to require racial segregation in intrastate travel.

That Court was functioning in a climate of race prejudice; indeed, Mr. Justice Harlan, in his dissent in that very case, points up the fact that the majority decision was based on the proposition that "race prejudice" was regarded "as the supreme law of the land."[2] At that time the sciences of

[1] Cf. Simkins, F. B., *The South, Old and New*, Knopf, New York, 1947, Chapter XXIV, particularly pp. 404 ff.

[2] 163 US 547 at 563.

sociology and anthropology were in their infancy. The strong glare of the light of fifty years' experience had not yet demonstrated the extent to which the theory that the Negro was inferior to other races was wholly fallacious. The Negroes' opportunity to prove how fallacious such theories were, was everywhere blocked. No opportunity existed to prove ability to improve occupational status.[3] Fifty-seven percent of the Negro race was illiterate in 1890; no Negroes voted in the South.[4] The Negroes of that day were commonly regarded as unfit to perform the functions of citizenship.[5] As a recent scholar reports:[6]

> "During the period when 'white supremacy' was being established in the South there was continual racial conflict. Sometimes there was conflict between individual whites and Negroes; at other times racial conflict took the form of organized violence. During Reconstruction the Negroes met the organized violence of the whites with some type of collective action on their part and the racial conflict developed into race riots. But gradually the organized resistance of the Negroes decreased and individual Negroes became the vic-

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[3] Cf. Harris and Spero, "Negro Problem," *Encyclopaedia of the Social Sciences* XI, p. 339.

[4] Simpkins, op. cit., p. 406.

[5] Senator Vardaman spoke what was too commonly accepted in his day when he stated: ". . . it matters not what his (the Negro's) advertised mental and moral qualifications may be, I am just as much opposed to Booker Washington as a voter, with all his Anglo-Saxon re-enforcements, as I am to the cocoanut-headed, chocolate-colored, typical little coon, Andy Dotson, who blacks my shoes every morning. Neither is fit to perform the supreme function of citizenship." (Lewinson, Paul, *Race, Class and Party*, pp. 84-85, Oxford University Press, 1932.)

[6] Frazier, E. Franklin, *The Negro in the United States*, pp. 159-160, Macmillan, New York, 1949.

tims of the organized violence of the whites. A rough indication of this type of violence is provided in the statistics on Negroes lynched in the South. Lynchings in the South increased rapidly from 1882, the first year for which statistics are available, up to 1890 and then showed a sharp rise in the early nineties when the white South began to legalize the subordinate status of the Negro. (See Diagram I.) Although the majority of the Negro victims were lynched for homicide, the avowed justification for lynching was the raping of white women. In over 10 percent of the cases the alleged cause for lynching Negroes included insulting white persons, robbery and theft, and a host of minor offenses. It appears that the lynching of Negroes was essentially an informal type of 'justice' designed to 'keep the Negro in his place.' Community sanction for this type of 'justice' was based upon the general belief that the Negro was a subhuman species and the fear that the Negro would get 'out of hand.' Lynching has been one of the fruits of the crusade to establish 'white supremacy.'"

In short, the Negroes' unfortunate status at the time of *Plessy v. Ferguson* was, as reported by Simpkins:[7]

> "Bereft of hope of political and social equality by the Reconstruction debacle, the Negroes' situation was indeed unfortunate toward the end of the Nineteenth Century . . . The doctrine of white supremacy appeared completely triumphant over the American creed of equality. Fresh arguments concerning the alleged incapacity of the race for improvement seemed to be confirmed by its own internal weaknesses: poverty, industrial inefficiency, crime and ill health."

Scholars of that day appraised the Negro as "inferior," and sought to justify "white supremacy" on the basis of

[7] Simpkins, op. cit., p. 435.

scientific fact.[8] But the fallacy of these views is now too apparent to require exposition. A comparison of the popular and scientific appraisal of the Negro as made in the works cited in footnote 8 with the data and conclusions of more modern scholars [9] demonstrates not only the tremendous strides made in the social sciences, but the utter fallacy of the attitudes which were extant at the time *Plessy v. Ferguson* was decided.

We submit that what the beliefs and attitudes of 1896 led the Court to hold to be a reasonable exercise of the police power for the public good, today, five and one-half decades later, in the light of the knowledge and experience of 1950, is demonstrably unreasonable and unrelated to the public welfare.

But not only have modern social scientists exploded the myth of white supremacy, the Texans' everyday experiences daily demonstrate that despite compulsory segregation laws of the type held reasonably necessary to the public safety in 1896, segregation in Texas and the South is rapidly be-

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[8] Hoffman, F. L., *Race Traits and Tendencies of the American Negro* (New York), 1897; Thomas, W. H., *The American Negro* (New York, 1901); Stone, A. H., *Studies in the American Race Problem* (New York), 1908); Page, T. N., *The Negro, The Southerners' Problem* (New York, 1904); Murphy, *Problems of the Present South* (New York, 1909).

[9] Myrdal, Gunnar, *An American Dilemma* (two volumes, New York, 1944); Harris and Spero, "Negro Problem," *Encyclopaedia of the Social Sciences*, XI, pp. 335-55; Allen, J. S., *The Negro Question in the United States* (New York, 1936); Frazier, E. Franklin, *The Negro in the United States* (New York, 1949).

coming as outmoded as the popular and scientific views which two generations ago sought to justify it.

Particularly in the last four years, since the Second World War, rapid strides have been made in interracial activities. A few typical examples are here presented.[10]

1.

Education

Texas, Oklahoma and Arkansas have had recent experience with Negroes attending graduate schools of their respective state universities on an equal and unsegregated basis. In September, 1949, Herman A. Barnett, a Negro from Lockhart, Texas, was admitted to the University of Texas Medical School.[11] Barnett is presently obtaining all the advantages of non-segregated education; his laboratory partners are white students. Barnett is fully accepted by his

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[10] To the extent possible, we have attempted to present the current fact and opinion with respect to racial segregation in this area from standard works or acknowledged experts in the field. Due to the rapid advances, and the fact that much of such material is so recent as not to have yet been authoritatively published, we have in several instances presented affidavits from those with knowledge of the facts. These are included in the Appendix hereto. We note that the Attorney General of Texas, in his brief on behalf of respondents, likewise has appended to his brief in opposition to granting the writ certain reports, poll results, and other data with respect to the current situation.

[11] Barnett is technically enrolled in the Texas State University for Negroes at Houston under a contract with the University of Texas covering graduate instruction not offered by the Houston institution.

professors and fellow students, and has pursued his studies without incident.[12]

And in Oklahoma, Ada Lois Sipuel Fisher, the plaintiff in *Sipuel v. Board of Regents of the University of Oklahoma*, 322 US 631, is now attending the University of Oklahoma Law School. The semblance of segregation was at first maintained by "Reserved for Colored" signs placed beside the Negro student's desk. But even this gesture toward legislative insistence on segregation[13] has not deterred white students from acceptance of Mrs. Sipuel Fisher and other Negroes as any other members of the class. Those who hold to the philosophy on which *Plessy v. Ferguson* was based may be shocked to learn that Negroes at Oklahoma today eat and study with white students, are housed on the University campus, and are accepted by fellow students without incident; indeed, that the "Reserved for Colored" signs posted by the Law School have been removed by white students.[14]

Mrs. Sipuel Fisher's experience is not an isolated one. About fifty other Negro students entered various schools of the University at the same time, the summer term, 1949. Student reaction to this phenomenon has been good. By

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[12] See Barnett's report attached hereto as Apuendix C, p. 28, *infra.*

[13] See Oklahoma statute, House Bill No. 405, approved by Governor on June 9, 1949, amending 70 O.S. 1941, Sec. 455-7.

[14] See Mrs. Sipuel Fisher's report attached hereto as Appendix D, pp. 29, 30, *infra.*

November, 1949, when 22 Negro students were enrolled for the fall semester, majoring in varied subjects ranging from pharmacy and zoology to social work and school administration,[15] a great majority of the students indicated approval. The November 10, 1949, issue of *The Oklahoma Daily,* page 2, the student newspaper serving the University of Oklahoma, reports as follows:

> "Seventy-six percent of the students and faculty members are in favor of removal of segregation on the campus. This is the result of a poll taken by the Equal Education Committee. A total of 1,092 persons were interviewed. Every school in the university was contacted. Allowing for a wide margin of error, it can be stated that a majority are in favor of removing the 'reserved for colored' signs . . ."[16]

Editorial comment in the Oklahoma student paper is likewise indicative of how the student body reacts to the "problem" of segregation. A lead editorial in *The Oklahoma Daily* recently proclaimed with satisfaction the end of "Jim Crow" in Oklahoma. Stories of Negro students' campus life are featured in other issues of the same publication.[17]

In Stillwater, at Oklahoma A. and M. College, five Negroes were enrolled at the fall 1949 semester. Investigation

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[15] *The Oklahoma Daily,* Dec. 16, 1949, p. 2.

[16] During the pendency of the *Sipuel* case, a student poll taken at the University indicated only 43.6 percent of the students favored admission of Negroes. (*The Oklahoma Daily,* Jan. 13, 1948, p. 1.)

[17] *The Oklahoma Daily,* December 16, 1949, p. 2.

by one of the undersigned disclosed that no segregation is there enforced, even in the seating arrangement of the classes, despite the requirement of the Oklahoma statute cited in footnote 13, supra.

The admission of Negroes to Oklahoma graduate schools has significantly pointed up the rapid change of attitudes not only of white students, but also of the townspeople. Previously, the University City of Norman, Oklahoma, had considered it an unwritten law that no Negro could remain in the city after dark.[18] Today Mrs. Sipuel Fisher has been invited, along with other students, to have dinner in the homes of white families in Norman.[19]

Similar experience is shown in Arkansas. Edith M. Irby was the first Negro student to enter the School of Medicine of Arkansas University. She reports that from the day of her admission, September 27, 1948, the white students were friendly, and at no time have given any indication that they resent her presence, despite the fact that she pursues her course of study on a completely non-segregated basis. Miss Irby's report, appended hereto as Appendix E, p. 31, *infra*, indicates a wholesome and naturally friendly relationship with white fellow-students.

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[18] *The Southern Patriot*, New Orleans, La., Vol. 7, No. 8, October, 1949.

[19] See Appendix D, p. 30, *infra*.

Similar experience [21] in Kentucky, Maryland, West Virginia, Virginia, North Carolina, as well as cited examples of unsegregated military experiences in the South, and other specific experience in Texas, led a recent writer in a leading southern journal to conclude:

> "As far as I have been able to ascertain in the past ten or more years, there has not come to public attention a single instance of the elimination of segregation in the South which has been attended by any untoward results . . . These examples are sufficient . . . to demonstrate that whenever and wherever the leaders in any community decide that segregation is to be eliminated and are willing to stand by their decision, no untoward consequences occur."[22]

The same author recites examples *in Texas* of Negro and white nurses being trained in the same classes without incident, of a Negro attending a technological school in Texas for four years, but then receiving his degree from the Negro college at Prairie View "because of some apprehension over legal technicalities which might invalidate his degree."[23] Further, this same author reports that:

> "After the first Sweatt trial a Negro student from

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[21] Compare the many examples in other southern states recited in "Some Progress in the Elimination of Discrimination in Higher Education in the United States", 19 *Journal of Negro Education* 1 at 4. (Reprinted in part as Appendix F, p. 33 ff, *infra.*)

[22] Thompson, Charles H., "Separate But Not Equal", *Southwest Review*, Southern Methodist Univ. Press, Dallas, 1948, Vol. XXXIII, No. 2, pp. 105-112.

[23] Ibid., p. 111.

> one of the Negro colleges in Austin went over to the University of Texas to borrow a book from the library, and as he was waiting in line to have his book charged, a number of students came up and congratulated him, thinking that he was Sweatt who had been admitted to the University."

The author concludes:

> "It is interesting and instructive to note that the reaction of students is much more progressive and constructive than that of their elders. In several instances in southern universities where student polls have been taken, only a few students were seriously opposed to having Negro classmates. Most of them were either favorable or indifferent."[24]

The justification for this conclusion insofar as the University of Texas student body is concerned appears in the latest student poll taken there in March, 1948, at which time 61.5 percent of the women students and 54.9 percent of the men students were in favor of Negroes attending not only the Law School, but also other graduate schools.[25]

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[24] Ibid., p. 111.

[25] *The Daily Texan*, Jan. 10, 1950, p. 1, col. 5. Cf. "Southern College Teachers Repudiate Jim Crow", *The Crisis*, Vol. 57, No. 1, p. 25 ff., reporting a recent poll of 15,000 southern college teachers by the Southern Conference Educational Fund, Inc., in which of the 3,375 who replied, 70 percent favored immediate admission of Negro students to graduate and professional schools without segregation.

2.

Politics

Mr. Justice Harlan, dissenting in *Plessy v. Ferguson*, referred to "racial prejudice" as "the supreme law of the land." Insofar as political participation was concerned, this was all too true at the time of that decision; indeed, substantially so until after this Court's decision in *Smith v. Allwright*, 321 US 649 (1944).[26] Even after that decision, effort was made in parts of the South, notably South Carolina and a few other southern states, to devise methods of avoiding its effect; but as is aptly demonstrated in V. O. Key's scholarly *Southern Politics*,[27] "the response of the South to the *Allwright* decision is more significant for what has not occurred than for the means that have been devised to circumvent the Constitution." Certainly, that is true in Texas. Despite dire predictions of "trouble" should the Negro be enfranchised in Texas, 75,000 Negroes voted in the 1946 Texas Democratic primary without incident.[28]

The Negroes' political activity is not today limited to the casting of a ballot. The conservative *Dallas Morning News*,

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[26] This Court's decisions in *Nixon v. Herndon*, 273 US 536 (1927), and *Nixon v. Condon*, 286 US 73 (1932); and *Grovey v. Townsend*, 295 US 45 (1935), had resulted in some Negro voting in general elections. Key, V. O., Jr., *Southern Politics*, Knopf, New York, 1949, pp. 619 ff.

[27] Ibid., p. 643.

[28] D. S. Strong, "The Rise of Negro Voting in Texas", *American Political Science Review*, 42, (1948), pp. 510-22.

which on frequent occasion views with editorial alarm the loosening of traditional race segregation patterns, in an article by its chief political writer within the past few weeks, reported on the effort of the Texas Negro to break down segregation, as follows:[29]

> "One victory is already won. That is on the political front . . . Today, Negroes not only vote in the Texas Democratic primaries; they also participate in precinct, county and state conventions. They sit with whites. Segregation has been wiped out at Democratic conventions."

Further indication of Negro political participation without incident of any kind is seen in the April, 1948, election of a Negro business man, G. J. Sutton, to the Board of Trustees of the San Antonio Junior College District.[30] This Negro leader had been sponsored by the interracial Organized Voters League, which though predominantly white, is headed by an equal number of Anglo, Latin, and Negro-Americans.

3.

Other Areas of Crumbling Segregation Barriers

We have demonstrated that integration of the races is already occurring in Texas to some degree, and that in the fields of education and politics such integration has not

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[29] *Dallas Morning News*, February 2, 1950, Sec. III, p. 4. The entire article is reprinted *infra* as Appendix G, pp. 36, ff.

[30] *San Antonio Register*, April 9, 1948, p. 1.

been attended by any untoward result. The same is true in other fields of social, religious and economic integration.

Texas Labor has recently taken a strong stand against segregation. The Texas State Federation of Labor, AFL, at its 1948 convention, unanimously resolved:

> "That it be mandatory upon each city seeking and acquiring future conventions of the Texas State Federation of Labor to provide for a suitable meeting or convention hall where there shall be no discrimination between race, color, or creed in seating and servicing future delegates to Federation conventions . . ."[31]

The Texas State Industrial Union Council, CIO, follows the same practice.

And in everyday business life the Negro in Texas in 1950 daily rubs shoulders with Anglo and Latin-Americans in Texas. The President's executive order 9980 governing fair employment practices within the federal establishment effectively prohibits "discrimination because of race, color, religion; or national origin" in federal employment in Texas as well as throughout the nation.[32] Pursuant thereto, Negroes work with whites in the federal service. In Dallas, Houston, and other Texas cities, Negro mail carriers and clerks work with whites.[33] Negro police protect life and

[31] Proceedings, Texas State Federation of Labor, 50th Convention, 1948, Fort Worth, Texas, June 21-June 24, pp. 210-211.

[32] 13 Federal Register 4311, July 26, 1948.

[33] Cf. order of the Postmaster General, "Procedure relative to fair employment practices", *The Postal Bulletin*, Sept. 20, 1949.

property in many Texas cities. And in the United States Air Force, which has large installations in Texas, integration of the races has been effectively accomplished. For example, at the Lackland Base at San Antonio, Texas, where some 26,000 Air Force personnel are stationed, the *New York* Times reports:[34]

> "All the recruits at vast Lackland Base here, the largest in the whole Air Force, live, eat and study as a body and the grouping together of Negro and white personnel has not caused any incidents. " 'The integration of the base was accomplished with complete harmony,' General Lawrence [Major General Charles W. Lawrence, Commanding General of the Indoctrination Division of the Air Force Training Command] stated, 'Order went through to completely end segregation among trainees on a certain date and when that date arrived the segregation ended. No unpleasant incidents resulted, and the white boys and the Negro boys in the training are getting on well together.' "

Lackland Air Base is not an isolated example. At many military establishments throughout the state, the same conditions prevail.

Finally, religious groups are making great strides in integration of religious activities of Negro and white Texans. As an example of such strides, the Executive Secretary of the Texas Methodist Student Movement, in a report appended hereto,[35] relates in detail the activities of over fifty local campus groups in the field of interracial religious activity.

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[34] *New York Times*, September 18, 1949, p. 53, Sec. L.

[35] Report of Rev. Paul Deats, Jr., Appendix H, p. 40, *infra*.

CONCLUSION

First-class citizenship for Negroes is an impossibility until this Court recognizes that the rule of *Plessy v. Ferguson* is an anachronism which cannot stand before the Fourteenth Amendment.

Despite the facts that the rule of that case has necessarily magnified the social inertia and the prejudice which is the patrimony of many white Texans, and that under the rule of that case normal and natural associations of free peoples have been declared unlawful, great strides in racial integration are now evident.

The social patterns in Texas and the South today are a far cry from the conditions which brought forth *Plessy v. Ferguson.* Now, not only have social scientists scotched the myth of white supremacy, but Texans in everyday contact recognize that the Negro is entitled to a place of dignity in a democracy. If the Constitution does not, as Mr. Justice Murphy suggested in his concurring opinion in *Oyama v. California,*[36] "render irrational as a justification for discrimination those factors which reflect racial animosity," the social scientist and the daily experiences of Texans have done so.

We are confident that this Court will consider the "reasonableness" of the exercise of Texas' police power in the light of current economic and sociological conditions.[37]

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[36] 332 US 633 at 663.

[37] Cf. *West Coast Hotel v. Parrish,* 300 US 379.

There appearing no reasonable basis for enforced segregation on the basis of race at the graduate school level; and to the contrary, it appearing that such segregation deprives Negroes of basic rights guaranteed by the Constitution, we respectfully submit that the Texas Court's denial of the petitioner's right to full and unsegregated educational opportunity should be reversed. The record in this case, the judgment of social scientists, and the daily experience of Texans make it quite apparent that Texans are prepared for such a decision.

Respectfully submitted,

L. N. D. WELLS, JR.

MARION C. LADWIG
Counsel for *Amicus Curiae*

MULLINAX, WELLS AND BALL
of Counsel,
1716 Jackson Street
Dallas, Texas
February 17, 1950

APPENDIX A

List of State-Wide Affiliates of the Texas Council of Negro Organizations

Ancient Free and Accepted Masons of Texas.
Baptist Ministers Conference of the B. M. & E. Convention.
Baptist Missionary and Educational Convention of Texas.
Colored Teachers State Association of Texas.
Democratic Progressive Voters League of Texas.
Free and Accepted Masons of Texas
Gulf State Dental Association.
Grand Court Order of Calanthe, Jurisdiction of Texas.
Grand Lodge, Knights of Pythias, Jurisdiction of Texas.
Heroines of Jericho, Texas Jurisdiction.
Independent Funeral Directors Association of Texas.
Lacy Kirk Williams Ministers' Institute.
Lone Star Medical Association.
National Boule, Alpha Kappa Alpha Sorority (Texas Jurisdiction).
National Council, Knights of Peter Claver (Texas Jurisdiction).
Negro Agricultural Workers' Association of Texas.
Order of the Eastern Star (Free and Accepted Masons of Texas).
Southwest Bar Association, Texas, Oklahoma, Kansas, Arkansas and Louisiana, (Texas Jurisdiction).
Southwestern Athletic Conference.
State Beauticians Association of Texas.
State Congress of Parent-Teachers Association of Texas.
State Sunday School and B. T. U. Congress, B. M. & E. Convention of Texas.
Texas Baptist State Sunday School and B. T. U. Congress, Texas Baptist Convention.

Texas Association of Colored Graduate Nurses.
Texas Baptist Convention.
Texas Baptist State Ministers' Institute.
Texas Commission on Democracy in Education.
Texas Commission on Participation of Negroes in Local, State and Federal Agencies.
Texas Conference of NAACP Branches of Texas.
Texas Federation of Colored Women's Clubs.
Texas Federation of Colored Girls.
Texas Negro Barbers Association.
Texas Negro Burial Association.
Texas Negro Chamber of Commerce.
Texas Negro Press Association.
Texas State Association, IBPOE.
Texas State Congress of Federated Civic and Social Clubs.
Texas Youth Conference, NAACP.
Texas Veterans Counsellors-Coordinators Association.
The Insurance Association of Texas.
The Texas Church Ushers Convention.
Women's Auxiliary, B. M. & E. Convention of Texas.
Women's Auxiliary, Gulf State Dental Association.
Women's Auxiliary, Lone Star Medical Association.
Women's Auxiliary, Texas Baptist Convention.

APPENDIX B

Consent of Petitioner for Filing Amicus Curiae Brief In the SUPREME COURT OF THE UNITED STATES NO. 667

HEMAN MARION SWEATT
vs.
THEOPILIS SHICKEL PAINTER,
Et Al.

} Consent for Filing *Amicus Curiae* Brief

The undersigned, as counsel for the Petitioner herein, does hereby give this written consent to the Texas Council of Negro Organizations, to file a brief as *amicus curiae* in the above numbered and entitled cause, in accordance with Rule 27, subdivision 9, of the rules of this court.

/s/ W. J. Durham
W. J. DURHAM
Counsel for Petitioner

APPENDIX C

Report of the First Negro Student to Enter the Medical School, University of Texas

STATE OF TEXAS)
COUNTY OF GALVESTON) AFFIDAVIT

I am Herman A. Barnett, a Negro from Lockhart, Texas, I am now a medical student at the University of Texas Medical Branch at Galveston, Texas. Even though I am the only Negro student enrolled in this medical school, I have had no unpleasant experiences during any of my contacts with either the other students or the faculty.

From the very first day I was accepted as just another student. I met most of the members of the freshman class during the first day of orientation. Also on the first day, several of the students invited me to work with them as a laboratory partner, and one of the upper classmen invited me out to his home to participate with several other freshmen in a study group which he was leading.

Because of the way in which I have been received by the personnel of the University of Texas Medical School, I am able to devote all my time and energy to the study of medicine without any fear of ill-will or rebuke.

/s/ HERMAN A. BARNETT

Sworn to and subscribed before me this 14th day of February, 1950, in the city of Galveston, Texas.

/s/ Thomas D. Armstrong
THOMAS D. ARMSTRONG
Notary Public in and for
Galveston County, Texas

APPENDIX D

Report of First Negro Student to Enter the Law School, University of Oklahoma

STATE OF OKLAHOMA }
COUNTY OF GRADY } AFFIDAVIT

My name is Ada Lois Sipuel Fisher. I was the plaintiff in the *Sipuel v. Oklahoma University* case, and am now a student in the School of Law at the University of Oklahoma.

After the Oklahoma Legislature passed a law allowing Negroes to attend, on a segregated basis, certain Oklahoma institutions of higher learning, about 50 other Negro students and I entered the University at Norman in June, 1949. I was the only one to enroll in the law school.

In spite of the provisions in the state statutes that we be provided separate classrooms and instructors, I attended classes with all the other entering freshmen. The semblance of segregation was maintained by "Reserved for Colored" signs placed beside my desk. These signs did not keep my classmates from coming back to talk with me and exchanging class notes. Gradually, the students took down the signs. From the first, my classmates were friendly. Now I am accepted as any other member of the class.

The only source of embarrassment, both to me and my classmates, has been the requirement of segregation. In spite of this requirement, however, we study together in the library, and on the lawn under the trees, have "bull sessions" in the halls and on the steps of the law school, and use the same drinking fountains and rest rooms. There

is no segregation whatever in our class meetings and activities. This fall the summer freshmen endeavored to get me elected as class treasurer, but the fall freshmen outnumbered us and took all the class offices. I lost by about 10 votes.

The other Negro students and I eat in the Union "Jug" at a table reserved for us at the back. All during the day, other students either sit at our table or pull their tables near ours in order that we can talk while having coffee.

Not only am I accepted in the School of Law, but I have been treated very kindly by white families in Norman who have invited other Negro students and me to their homes for dinner.

I am happy finally to be enrolled in the State University, both because it is a good school and because it is located near my home, consequently less expensive for me to attend.

ADA LOIS SIPUEL FISHER

Sworn to and subscribed before me this 17th day of February, 1950, in the city of Chickasha, Oklahoma. Oklahoma.

BERTHA C. FLETCHER
Notary Public

{Seal}

APPENDIX E

Report of First Negro Student to Enter the Medical School, University of Arkansas

TO WHOM IT MAY CONCERN:

Being the first Negro student admitted to the School of Medicine of Arkansas University, the other students seem to have gone out of their way to make me feel that I am welcomed. On the very first day, September 27, 1948, all three of the white girls and about a third of the white boys who also were entering as freshmen, made it a special point to meet me. I remember the seating arrangement at our very first class: one of the white boys was sitting to my left; and one of the girls to my right. From then on, I have had no fear that the students would resent my presence.

Here at the Medical School, we have had no problem with the matter of segregation, like my friend, Jackie Shropshire, had when he entered the Law School at the University in Fayetteville, Arkansas. Here there was no attempt to "fence in" my desk, as they did his for the first few days, before his fellow students tore down the railing.

Since we do not have any study halls in the Medical School, we usually study in each other's apartments. The three other girls, all residents of Arkansas, have become very close friends of mine. Several of the fellows and I often during the day go to one of the girl's apartment near the school to discuss and study our lessons. About every other evening, after classes, two of the girls and I go by the grocery store, and take food to my apartment or to

one of theirs, where we prepare our evening meal before studying together late into the night.

At noon, those of us who take our lunches eat together in one of the rooms at the school. Oftentimes, after classes, I go with several of the students to "drive-in" cafes to eat.

I have met so many fine people, here in Little Rock and at the Merical School, that I have been having a good time. Not a single person has been unkind to me.

/s/ Edith M. Irby
EDITH M. IRBY

Subscribed and sworn to before me, in the City of Little Rock, Arkansas, on February 10, 1950.

/s/ ANNA JEAN JONES
Notary Public

{Seal}

APPENDIX F

Excerpt from the Journal of Negro Education

Vol. XIX, No. 1, Page 4, Winter, 1950

EDITORIAL COMMENT

SOME PROGRESS IN THE ELIMINATION OF DISCRIMINATION IN HIGHER EDUCATION IN THE UNITED STATES

Elimination of Secregation at the University Level in the South

Probably the most encouraging step which has been taken in this area has been the admission of Negroes to several Southern state-supported graduate and professional schools which hitherto excluded them because of their race. And what is more important, there has not been reported a single untoward incident of any kind as a result of the change. Prior to the school year 1947-48, only two state-supported universities in the South had admitted a Negro student for more than 50 years. The law school of the University of Maryland admitted a Negro student in 1935, and around ten years ago the State University of West Virginia began to admit Negro students to its graduate and professional curricula. In each case the experiment proved successful beyond anyone's expectations, and Negroes have since become a normal part of the student population.

More recently, state-suported universities in five Southern states have admitted Negroes to various schools and colleges. (1) The University of Arkansas in 1947-48 admitted a Negro to its law school on a segregated basis. The next

year the University admitted a Negro girl to its medical school on a non-segregated basis, and eliminated the segregation initially imposed in the law school. (2) The University of Delaware announced in 1948 that it had revised its policies so as to permit the admission of Negro students to any curricula available at the University which were not available at the Negro college at Dover. A dozen or more Negroes attended the University last summer and several are at present enrolled. (3) The University of Oklahoma, under a directive of the Board of Regents, admitted a Negro student on a segregated basis to its graduate school in 1948. A little later Negro students were enrolled in some of the professional schools on a non-segregated basis. (The case of the student admitted on a segregated basis is now before the U. S. Supreme Court to determine the constitutional validity of the practice.)[7] (4) The University of Kentucky admitted Negro students to its graduate school last year for the first time, enrolled a sizeable number in its summer session, and has several enrolled at the present time. (5) The University of Texas this year admitted a Negro to its medical school courses at Galveston, but required him to register as a student in the Texas State University for Negroes in Houston.

The instances cited here all involve state-supported universities in the South which hitherto had excluded Negroes. In all, state universities in some seven Southern and border states now admit Negro students to various schools and colleges within their university organizations. It might be noted in passing that some of the privately-controlled universities and colleges in Missouri, North Carolina, Virginia

[7] See: McLaurin v. Board of Regents of the University of Oklahoma, et al.

and the District of Columbia also admit Negroes; thus increasing the number of states in this category to ten and the District of Columbia. In addition to the fact that the number of such instances is increasing, the important point to be noted here is not why these institutions have changed their admission policies and practices, but rather that, having changed them, none of the dire predictions which were made before-hand has materialized. As a professor at the University of Kentucky observed:[8] "University of Kentucky tried Plan A this summer. Worked out O.K. as far as I learned. The sky did not fall, neither did any of the buildings fall down, nor did any of the students get contaminated."

Speaking of the attitudes of professors in Southern universities and colleges, attention is called to a poll which has just been completed by the Southern Conference Educational Fund and printed in this number of the *Journal*.[9] More than two-thirds (68%) of the teachers in state and privately supported white higher institutions in the South favor the immediate abolition of segregation on the graduate and professional level. And, I might add, that the attitudes of white students in these institutions are even more favorable.

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[8] See: Section F of the curent number of the *Journal*.

[9] Ibid.

APPENDIX G

Article Printed in The Dallas Morning News February 2, 1950

NEGRO ATTACK ON SEGREGATION

By Allen Duckworth

Last year, in speaking to Negro graduates of the new state university at Houston, the late Beauford H. Jester said:

"Heaven is not reached in a single bound."

Yet, as far as the Texas Negro may be from Heaven, he has taken some long bounds in the last six years. These bounds have been longer than the average Negro, or the average white, probably realizes.

The effort of the Texas Negro to break down segregation can be divided into three phases—political equality, educational equality and social equality.

Strong support by legal talent from the East, especially through the National Association for Advancement of Colored People, is behind the 3-pronged campaign.

One victory already is won. That is on the political front.

Until 1944, the Negro in the South was classed with Republican politics. It was Abraham Lincoln, the Republican, who gave the Negro his freedom. By tradition, the Democratic party of the South was the party of the white man. And the Democratic primary elections were limited to whites.

The United States Supreme Court, controlled by Roosevelt appointees, ruled in 1944 that Negroes must be admitted to Democratic primaries. That reversed the Negro political fealty in Dixie. For he was not unappreciative of what the Democratic party under Roosevelt was doing. Had not the Democratic party done what the Republicans had merely talked about? This appreciation was evident shortly after the Supreme Court ruling. Dallas Negroes raised money for the Roosevelt-Truman Texas campaign.

Today, Negroes not only vote in Texas Democratic primaries; they also participate in precinct, county and state conventions. They sit with whites. Segregation has been wiped out at Democratic conventions. Conservative delegates from Dallas and several other counties were kicked out of the convention at Fort Worth in September, 1948. As the conservatives walked out, they saw dozens of Negroes filing in to take the seats they had just vacated. The Negro had come a long way. It couldn't have happened four years before.

Two years after the Negro won political equality, he turned to educational equality.

Heman Marion Sweatt entered as the main figure on that scene. Sweatt wanted to enroll in the University of Texas law school. When denied that right, Sweatt sued.

District Just Roy C. Archer of Austin held that the State of Texas must (1) provide separate but equal educational opportunities for Negroes, or (2) let them enter the university for whites.

The state heeded the warning and proceeded to establish a separate university for Negroes at Houston. The univer-

sity is now a going concern, with more than 2,000 Negroes studying there.

In order to meet requirements for Sweatt, the university set up a temporary and separate law school near the Capitol grounds in Austin.

Sweatt did not enroll at either the Houston university nor at the branch law school at Austin.

His reason became obvious in later trials and appeals of his lawsuit.

Atty. Gen. Price Daniel attempted to show in the courtroom that it was not the purpose of Sweatt and his attorneys (from the National Association for Advancement of Colored People) to get Sweatt an education alone. They wanted Sweatt in a white university, Daniel argued. The Daniel argument was upheld in Sweatt's own testimony.

Sweatt said he would not enter a separate school for Negroes, even though it might be adjudged equal to the main University of Texas law school.

"I don't believe in segregation," Sweatt said.

The Negro litigation on education is tied closely to the third phase of the NAACP campaign—the drive for social equality, as witness Sweatt's own statement on segregation.

Latest on the antisegregation suits involves not politics, nor education, but recreation. Negroes now are demanding "equal" facilities at state parks. The legal argument of the Negroes is recognized by the State Parks Board. The board

has ordered state parks closed this year unless means can be found to accommodate Negroes.

Just how a state park could give Negroes "equal" accommodations is a puzzle. For instance, along the Frio River in Garner State Park, whites now camp, swim and fish. A Negro could argue that it would not be "equal" for him to camp upstream. No matter where you put the Negro in Garner Park, he could claim that he did not an equal view of the mountains, or of the river, nor did he have the same access to the recreation centers, such as the dance terrace.

Negroes also are shooting for equality on the municipal golf links at Houston. They want equal rights in golfing.

The NAACP lawyers follow a smart path. They believe they can make segregation too expensive. By potshotting on specialized schools, they are bringing the cost of segregation to the front. For instance, if they decide to demand enrollment of a single Negro for a course in mining, the University of Texas might have to admit that Negro at the El Paso branch or build an entirely separate plant for him. In order to set up a segregated mining school, the Negro lawyers estimate, the university would have to spend $5,000,000. And that's a lot of dollars for one student.

The Supreme Court of the United States is due to hear Sweatt case arguments in a few days. The NAACP is banking on this decision. It is the key to their fight against segregation of any kind in Texas and the South.

Here is the statement of the NAACP itself: "When and if the Sweatt case is won, from that moment on segregation will begin to crumble."

APPENDIX H

TEXAS METHODIST STUDENT MOVEMENT
2403 Guadalupe Street
Austin, Texas
February 12, 1950

Report on Interracial Activities

The Texas Methodist Student Movement, with contacts in over fifty local campus groups, has been interested in interracial work for several years. This is partly due to a real concern on the part of white students and leaders for the religious welfare of students in Negro colleges. It is also a response to the action of the last General Conference of The Methodist Church, calling on Methodists to work toward the elimination of segregation in their church meetings.

This work has been most evident in the annual Thanksgiving Conferences held by the movement, beginning in Denton in 1944, when one of the leaders was a Negro minister and educator. In 1945 the conference was held in Corsicana, again with one Negro speaker and this time with four or five Negro students attending sessions and eating with the white students. Since this time, provisions have been made for each conference to be held interracially; however, no Negro delegates attended the 1946 conference at Hillsboro. The 1947 conference was held in Austin, with over twenty Negro delegates from two colleges in attendance. Some students were housed interracially, all delegates ate together in a public "white" cafeteria, and sessions were held in the campus church. In 1948 one Negro speaker and three Negro students attended the conference

in College Station. The 1949 conference, held in Mineral Wells, included fourteen Negro students and faculty members, plus an outstanding Negro speaker. This conference was fed in a public dining room.

There have been several smaller institutes (week-end training schools), held in the last few years on an interracial basis. Students have indicated their interest in holding interracial conferences by setting aside $150 of their state benevolent budget of $2200 to help with expenses of Negro delegates.

The South Central Regional Leadership Training Conference for Methodist students has been held for several years on an interracial basis; it has been invited to hold its June, 1950, session in Dallas on the same basis.

For at least a decade in Austin there has been a cooperative program involving students from Samuel Houston and Tillotson (Negro Colleges) and from the University of Texas "Y" and church groups. Events have included the annual Race Relations Sunday observance (often with an interracial choir), supper and evening meetings for distinguished Negro and white visitors, and leadership projects. The Presbyterian student group at the University of Texas organized and met with a similar group at Tillotson. Negro students and townspeople have been welcomed at white church services and concerts for a number of years.

/s/ PAUL DEATS, JR.
Executive Secretary